

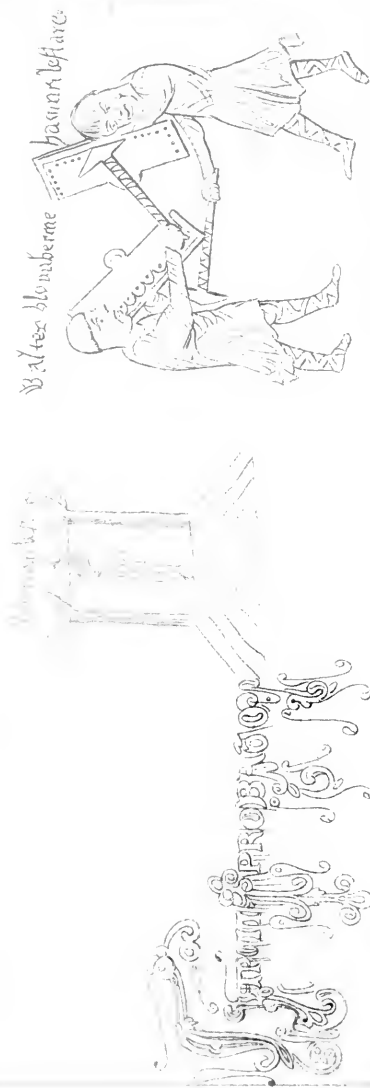


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A Copy of an Ancient Drawing of a Tudor's Court, between
Haller, Blomerne and, Humer to, Hure,
in an Appeal of Robbery, Temp. Henry VI., still remaining in the
Record Office in the Tower of London.

See Page 174, Note.

AN ARGUMENT

FOR CONSTRUING LARGELY

THE RIGHT OF AN APPELLEE OF MURDER,

TO INSIST ON

TRIAL BY BATTLE;

AND ALSO

FOR ABOLISHING APPEALS:

With an Appendix,

CONTAINING A REPORT OF A DEBATE IN THE HOUSE OF COMMONS,
ON ABOLISHING APPEAL OF MURDER IN THE BRITISH
NORTH AMERICAN COLONIES, &c. &c.

BY E. A. KENDALL, Esq. F. A. S.

"I am for taking away the Appeal for Murder entirely; but I am not
for taking it away in part."

CHARLES JAMES FOX.

THIRD EDITION;

INCLUDING REMARKS ON THE REPLICATION OF THE APPELLEE,
ASHFORD V. THORNTON, IN THE KING'S BENCH,
JANUARY 24, 1818.

London:

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1818.



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For establishing New and Distinct Colonies, for the Relief of the Half-Casts of India and Mulattoes of the West Indies;

A P O S T S C R I P T

On the Benefits to be derived from establishing Free Drawing-Schools, and on other Means of advancing the National Industry, Numbers, and Greatness; and

AN ADDITIONAL POSTSCRIPT,

Comprehending a Copy of "A Report of a Committee of Congress, on Colonizing the Free People of Colour of the United States."

BY E. A. KENDALL, ESQ. F. A. S.

This day is published, by Baldwin, Cradock, and Joy, Paternoster Row,
In one Volume, 8vo. Price 12s.

THE COLONIES,
AND
THE PRESENT AMERICAN REVOLUTIONS.
BY M. DE PRADT,
FORMERLY ARCHBISHOP OF MALINES.

TRANSLATED FROM THE FRENCH.

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ADVERTISEMENT

TO THE THIRD EDITION.

SINCE the appearance of the preceding edition, the Court of King's Bench has heard the Replication of the Appellee (Ashford against Thornton) to the Counterplea of the Appellor*, in which, after protesting that the Counterplea is insufficient, and that the Appellee is "not under any necessity, nor in anywise bound to answer the same," a statement is made of alleged facts, in rebutment of the "violent presumptions and strong proofs" alleged in the Counterplea. Forbearing, as hitherto, from all observation on the merits of this particular case of Appeal of Murder—it is only necessary, here, to take notice of what relates to the grounds assumed by the Appellor and Appellee respectively, with the view of observing the bearings of the law, and the future

* See within pages xviii and 198.

decision of the Court, the following extracts from the Replication are all that is necessary for our purpose:—

“ And the said Abraham Thornton saith, that he the said Abraham Thornton, notwithstanding any thing by the said William Ashford, in the said Counterplea alleged, ought to be admitted to Wage Battle in this Appeal with him the said William Ashford; because, protesting that the said Counterplea is insufficient, and that he the said Abraham Thornton is not under any necessity, or in anywise bound, by the law of the land, to answer the same; nevertheless, for replication to the said counterplea in this behalf, the said Abraham Thornton saith, that before and at the time of the issuing of the Writ of Appeal of him the said William Ashford, in this suit, there were and still are the violent and strong presumptions and proofs following, that he the said Abraham Thornton was not and is not guilty of the felony and murder aforesaid, in the said Writ of Appeal and count charged and alleged against him; that is to say, &c. * * * * *

And so the said Abraham Thornton saith, that the several facts and circumstances in this replication set forth stronger and more violent presumptions, and are the stronger proof that he the said Abraham Thornton is not guilty of the felony and murder whereof he is appealed as aforesaid, than the said presumptions and proofs in the said counterplea, set forth, that he the said Abraham Thornton is guilty of the felony and murder whereof he is so appealed as aforesaid; and this he the said Abraham Thornton is ready to verify: wherefore he prays judgment, and that he may be admitted to wage Battle in this Appeal with him the said William Ashford, &c.”

The next remark that is now to be made, is this, That by the tenor of the Counterplea and Re-

plication now put in, the Court of King's Bench is called upon to decide the fate of the prisoner according to its own view of the probabilities or improbabilities of his guilt;—a proceeding abhorrent in its principle to the whole fabric of English criminal jurisprudence, and at variance with the ancient and legitimate practice under Appeals; and to which it is impossible to believe that the Court will suffer itself to be compelled. If the extreme length of the two papers referred to, as well as the Author's uniform desire to discuss the law of the case entirely abstracted from the facts of the particular transaction before the public, did not concur to prevent their insertion in this place, it would be seen on what a variety of facts, topographical and other, it is thus attempted to draw from the Court an opinion, and on that opinion a sentence; facts concerning which the Court will never receive the statements and affidavits of either party as evidence, or admit that it possesses any means or competence to come to any conclusion whatever*. The

* The reader must refer, for himself, to the Counterplea and Replication, and observe the accounts of miles, furlongs, and

Court, by the opposite statements of the parties, must be placed in the very situation contemplated by the true law, in Appeals—that of being unable to see its way—and therefore left with no alternative but to award Battle, that the two adversaries may *fight it out*.

But (agreeably with what is insisted on, in the the ensuing pages) such is the contradiction of modern ideas, to those on which Appeals are founded; and such the reversal of the circumstances and positions belonging to their prosecution, that (with great deference, and with no feeling of disrespect toward the Learned Counsel engaged, be it said) the tenor, as well of the Replication as of the Counterplea, is in direct hostility to the object; or, at least, the parties, re-

yards, strait roads and crooked paths, in Warwickshire, and all the interminable controversy concerning “country clocks,” &c. and ask himself, in the behalf of common sense, how these things can be brought to issue by the Court of King’s Bench, sitting in Westminster Hall? How can the Court form any opinion on the matter, or ascertain more than the single fact, that there are assertions on the one side, and denials on the other, between the Appellor and Appellee?

spectively speaking in each, are made to say, exactly that which each ought not to say. The Counterplea, when it rests the accusation against the Appellee upon "violent presumption," lays the very ground upon which Battle may be claimed to be awarded; and the Replication, by rebutting the presumption of guilt, should have for its object, to pray, that Battle should *not* be awarded—that the Appellee should *not* be obliged to give gage of Battle—but that the Appeal should be dismissed! To see an *Appellee* soliciting to be "permitted to wage Battle," is a little perplexing. This is the very prayer of the *Appellor*. The *Appellee*, in his reply, should either (1) confess himself guilty; or (2) plead "not guilty," and give gage of Battle; or (3) repel the "violent presumption" of guilt, and pray the Court to dismiss the Appeal. The *suit* of Battle is on the side of the *Appellor*; the *hardship* of Battle is on that of the *Appellee*. The *Appellee's right* to Trial by Battle, exists only as his means of defence against an Appeal, when that Appeal is founded on violent "presumption" of guilt.

It is to be expected that these latter remarks

will be treated with very little attention, and even with entire contempt. It seems to be the modern understanding of the law, that a man may appeal the first stranger he meets, in turning the corner of a street, and, without rhyme or reason, compel the Court to award him Battle against him; but that if, on the other hand, he can show a "violent presumption of guilt," then he may take an easier course, and procure his victim to be hanged by the voice of a Jury, and even by that of a second Jury, in defiance of the acquittal of a first! This, it should seem, is actually believed to be the criminal law of England; and upon such a tenure, it is thought, the subject holds his liberty and life! The Courts, it is imagined, are obliged to allow the Appeal, *of right*, and without inquiry into its merits, and without authority to relieve an Appellee against whom there is even no "presumption" of guilt, save in the mind, or in the words of the Appellor! That it is so thought is evident, or "violent presumption of guilt," which is the only reason for allowing an Appeal, would never be offered as a reason for ousting the Battle.

To those, however, who shall bestow a perusal on the Argument which follows, and on the passages from early writers which it adduces, the question will appear in a different light. In particular, the reader is earnestly requested to consider some observations of Beaumanoir, in his *Contumes de Beauvoisis*, cited at page 187. From those observations, combined with others, also cited or referred to, it will surely appear, that *three* things are within the power of the Court, accordingly as the complaint of the Appellee shall assume one of *three* complexions ; and the inquiry now suggested is of the more immediate value, as it will, perhaps, (though this is thrown out for examination only) point out the means of escaping the difficulties which are supposed to attend the disposal of the existing case of Appeal, and especially the means of getting rid of the Trial by Battle.

It is obvious that an Appeal may be made under each of the three descriptions of circumstances that follow :—

1. With little or no presumption of guilt.

II. With “violent presumption” of guilt.

III. With direct proof of guilt.

It is equally obvious from reason, and it will be found equally obvious from books, that the Courts are competent to each of the three following courses of proceeding, severally adapted to Appeals under the three varieties of circumstances mentioned:—

I. To DISMISS AN APPEAL which is founded upon little or no presumption of guilt.

II. To AWARD BATTLE upon an Appeal which is founded on “violent presumption” of guilt, but upon “violent presumption” only.

III. To SEND AN APPEAL TO A GRAND JURY, where there is *direct evidence* of guilt.

The Author will not lengthen the present observations, by citing again the various quotations

contained in, or appended to, his Argument, on which he relies for maintaining this doctrine, nor by entering, in this place, into a new Argument, supplementary to his original one; but content himself with the suggesting three subjoined heads of inquiry.

I. Whether the subject is not protected by Magna Carta from all consequences of an Appeal supported by the simple accusation of the Appellor, and where no “violent presumption” of guilt is shown to exist*? and,

II. Whether, if an Appellor desires a Trial by Jury, and shows the Court that there exists *direct evidence* of guilt, such as is fit for the consideration of a Jury, it is not to a GRAND JURY that he should be sent for his remedy?

III. Whether, when an Appeal is thus sent to a Grand Jury, it does not lose all the characteristics of a private suit, as to power of pardon in the Crown, &c.

* See within, page 128, note.

The Author is prepared to support the affirmatives of these questions, but is obliged to consult both his own want of leisure, and the patience of the Reader ; and therefore dismisses this sheet with an earnest hope, both that the real state of the law will be fully investigated in one quarter ; and that such as it really is, it will be wholly abrogated in another.

London, January 26th, 1818.

ADVERTISEMENT

TO THE SECOND EDITION.

UNDER the existing law of the kingdom, there are several offences, which, though, at this day, they are regarded as *public wrongs*, and are therefore punishable, at the suit of the Crown, upon prosecution by *Indictment*, are also, upon authority of ancient custom and ancient statutes, regarded as *private wrongs* also, and are therefore punishable, at the suit of the Subject, upon prosecution by *Appeal*, or summons. By a peculiarity, which has grown out of the gradual change of our laws, from their ancient to their modern state, and out of the necessity of temporizing with the habits and prejudices of the people, a very partial exception, in the case of Murder only, and under very arbitrary circumstances, has been created, by Statute, to the universal maxim of the admirable Common Law of England, That no man is to be brought into jeopardy of his life more than once for the same offence ; for, in these

cases, a man may be tried again, at the suit of a subject, even after an acquittal at the the suit of the Crown. On the other hand, it is a part of the same provision of law, that in the generality of instances, the Appeal may be tried either by Jury or by Battle.

The whole proceeding is of ancient and barbarous institution; but the change of manners, united with the oblivion of sound principles, has wrought this unfortunate issue, That while the public sentiment has become strong against the Trial by Battle, it views with favour the more unreasonable proceeding of an Appeal, after a trial, and even after an acquittal, upon Indictment! Thus, in an Appeal of Murder, at present pending in the Court of King's Bench, the Appellee having called for Trial by Battle, the Counsel for the Appellor is reported to have addressed these words to the Bench:—"My Lord, I did not expect, that at this time of day, this sort of demand would have been made. The Trial by Battle is an obsolete practice, &c.*" In truth,

* See the newspaper reports of the proceedings in the Court of King's Bench, *Ashford v. Thornton*, Nov. 17, 1817.

the Trial by Battle, though not less lawful than Appeal, has long fallen into disuse, while the Appeal has maintained its ground, in all its baleful vigour. So lately as within the latter half of the preceding century, several Appeals of Murder have been prosecuted, and several (as is possible) innocent victims have fallen beneath their weight; while the Trial by Battle has been so long neglected, that it is believed to be more than two centuries since a Judicial Combat was fought.

Upon occasion of more than one recent Appeal of Murder, the popular feeling has appeared to be universal upon the side of the modern erroneous views of the case. In common with the Counsel for the Appeal, the whole country has evinced a disposition to refuse Trial by Battle, but to support the practice of Appeal. It is probable that in the ensuing session of Parliament some step, in relation to Appeals, will be proposed; and public opinion has too much influence upon all our affairs, to be safely left on the wrong side upon any. Parliament has repeatedly resisted every effort to procure an alteration of the law,

either as to Battle or to Appeals ; and no longer ago than within forty years, two attempts were unsuccessfully made, in the House of Commons, to procure the ABOLITION OF APPEALS OF MURDER. Even in our Courts of Law, (where, on the subject of Appeals, the most exceptionable proceedings have been had) a decided disposition has so often manifested itself, to assist, rather than to defeat, the barbarity of a second prosecution, obtained by the MISUSE OF THE RIGHT.

Under these circumstances, the first edition of this Argument was hastily given to the public *, with more solidity, however, on the side of its *reason*, than on that of its *law* ; a defect at which the Author is the less concerned, because law-reading is a pursuit wholly foreign to his usual employments. Since the printing of that edition, an increased seriousness has been given to the question, by the tenor of the *counter-plea* of the Appellor, entered in a case already alluded to ; a counter-plea which, if admitted, will go to aggravate,

* On the 21st of November last.

to a degree even yet unheard of, the offensiveness of the proceedings under Writs of Appeal. The Author, having had his attention drawn to the subject, has not been able to resist the temptation to fortify his opinions by facts and authorities; and thus, with somewhat better preparation, and, as he persuades himself, with an increased urgency for public inquiry, to send this revised and enlarged copy of his Argument to the press. The importance of the whole matter, to the liberty and life of every subject, to the political interests of the nation, to the abstract notion of right, to the theory of public justice, to the character of British laws and society, to the sanctity of TRIAL BY JURY, and to the true completion and maintenance of the CONSTITUTION; the evident absence of public information, and the apparent danger of the worst results; are apologies for any effort, however feeble, to disseminate juster views of its History and bearings.

All, that upon the present occasion, has hitherto appeared in print, (the preceding edition of this Argument excepted) has had the fatal aim which it is the purpose of these pages to

deprecate. Many correspondents of the several newspapers have exerted themselves to suggest what they conceive to be the means of obstructing the Trial by Battle, but none have betrayed a wish to get rid of the Appeal*. And the Editors themselves, of those papers, have either been silent, or have followed the sentiments of the vulgar, instead of applying themselves to the unpopular task of attempting their correction. On the part of the whole public, in fine, a willingness to abolish by law the Trial by Battle, is manifested strongly enough: but the subject of fear is, the prevalence of an equal willingness to preserve the practice of Appeal.

The observations and facts that follow are too imperfect and incomplete to answer any other purpose than that to which is presumed they are really adequate—the purpose of demonstrating the necessity of further reflection and inquiry. The Author anticipates, without anxiety, the exposure of many technical errors, in what he has pro-

* An exception, however, is to be made, in favour of the writer of a letter which appeared in the Sun of the 21st of November.

duced, nor can even the proof of large share of ignorance of the facts of the subject, be an imputation upon him, nor upon any one, seeing the scanty acquaintance with it that has been hitherto possessed, by the most eminent lawyers, historians, and statesmen. From every intelligent reader, but particularly from those to whom it belongs to enlighten the public mind, or to direct the public councils, an earnest examination of the merits of the case is demanded; and this must be performed, not with a delusive reliance on celebrated names, either in law, history, or philosophy, but by an eager search for, and patient decyphering of, original writers, and by a fearless trial of the weight of hardy assertions and of venerable dogmas. We must lay aside, on this occasion, the works of Montesquieu, Robertson, Blackstone, and Henry, and other the *belles-lettres* writers on law and legislation*,

* It is to be regretted, that in such works as the modern edition of Sir Hale's History of the Common Law, (8vo. 1794) the student should be misled, in the notes, by lazy extracts from Henry, Blackstone, &c. instead of being taught to dig for the true ore of learning in original writers. At p. 188, vol. I, of the work just mentioned, we find (for example) a long quotation from Henry, beginning with the continually-repeated mis-

and even the “modern sentences” of the Courts, and go up to the real sources of instruction; taking our law from less questionable expositors*, and our reason from new medita-

representation of the origin of Trial of Battle: “The Judicial Combat, or Duel, though it had long been established in France and Normandy, and other countries on the Continent, was first introduced into England by the Normans, &c.”

Writers of compilations are infinitely mischievous, when, by the false appearance of completeness, they seduce the learner to believe that he has nothing more to seek; they are still, and beyond description worse, when, as too commonly happens, they falsify, at every step, the story which they undertake to tell.

The true friend of learning will think, that there is a more useful, though less ambitious mode of employing his labours; namely, in promoting, by all the means that suggest themselves, the extended recurrence to primary sources—to books of the earliest writers—in attempting to render the meaning of whom, and especially in combining the texts of any two, he will himself tremble for his own perpetual mistakes and misapprehensions. To every student, therefore, he will say, Go, and read them for yourself, and trust to no man’s rendering, nor even to his transcription.

* Many of these are continental writers. Robertson well observes, “The state of government, in all the nations of Europe, having been nearly the same during several ages, nothing can tend more to illustrate the progress of the English constitution, than a careful inquiry into the laws and customs of the kingdoms on the continent. This source of information has been too much neglected by English antiquarians and lawyers. Filled with admiration of the happy constitution now

tions of our own, released from every fetter of traditionary prejudice, and purified from every mist of passion and misconception.

The question before us presents itself in two shapes; the one *judicial*, and the other *political*; the one regarding our LAW, and the other regarding our CONSTITUTION: and, to the industrious, the courageous, and the temperate inquirers that have been supposed, it is presumed that the following propositions, severally illustrating it under this two-fold aspect, will ap-

established in Great Britain, they have been more attentive to its forms and principles, than to the condition and ideas of remote times, which, in almost every particular, differ from the present¹. While engaged in perusing the laws, charters, and early historians of the continental kingdoms, I have been often led to think, that an attempt to illustrate the progress of the English jurisprudence and policy, by a comparison with those of other kingdoms in a similar situation, would be of great utility, and might throw much light on some points which are now obscure, and decide others which have long been controverted." *Proofs and Illustrations, Hist. Charles V.*, vol 1, note xliv.

¹ Here is an useful hint for those who talk of *restoring* to the people their *ancient* constitution, rights, &c.: or rather, for those whom they deceive. But "modern philosophers," says Mr. Pinkerton, "never read, and therefore make many discoveries."

pear to be founded in legal, historical, and political truth :

I. That the law contemplates two classes of DUEL, or BATTLE between man and man; the one UNLAWFUL, and the other LAWFUL*.

* That there may be no difficulty, on the part of the general reader, as to the acceptance of the phrases *lawful* and *unlawful Duels*, the following extract is here made from Comyns's digest of the law of BATTLE, in which, at the same time, it may not be disagreeable, to such a reader, to find the whole law of ordinary or "unlawful" Duel:—

" DUEL.

" *But a Duel without authority of law, is punishable as homicide, if death ensues.*

" So, if death do not ensue, the engagement was punished by censure in the Star-chamber, and the party shall be fined and imprisoned, and bound to his good behaviour. 3 Inst. 157, 8.

" So, the challenge was punishable in the Star-chamber. 3 Inst. 158.

" And it will be a breach of the peace, if it be made by word, message, or writing. 3 Inst. 158.

" So, if a sheriff, justice of peace, constable, or other peace officer, see a duel, or affray, he ought to endeavour to part, and apprehend the parties, otherwise he shall be fined and imprisoned. Ibid.

" So, if he prays assistance of any who are present, and they refuse, they shall be fined and imprisoned. Ibid.

" So, every by-stander, though he be not an officer, may

II. That **UNLAWFUL DUELS** are those which are fought without due authority of the law, and formal award of His Majesty's Courts; and that **LAWFUL DUELS** are those which are fought with authority, and under formal award*.

III. That all **DUELS** are for the termination of **QUARRELS**; that all quarrels relate either to personal injuries or to claims of property; and that the law contemplates the practice of solemn **DUELS**, for the termination of quarrels of both classes.

endeavour to part them, and shall have a remedy, by action, if he be struck or hurt in his endeavour. Ibid.

"If any be killed, or thrown down as dead, in such affray, every by-stander ought to endeavour the apprehending of the offender, otherwise he shall be fined and imprisoned. Ibid."

* These are the Duels opposed by the author of the "*Anti-Duello*," a pamphlet printed in the year 1632, apparently on occasion of the Battle awarded in the preceding year, in the Court of Chivalry, on an Appeal of Treason, by Lord Rea, against Mr. Ramsay. From the title alone, the reader might suppose it directed against "unlawful," or ordinary Duels, as was the case with the French pamphlet from which it is borrowed: "*Anti-Duel; ou, Discours pour l'Abolition des Duels; contenant deux Remonstrances; l'une a la Noblesse, recuëlle des derniers propos du Sieur de Balagny; l'autre a sa Majesté.*" Paris, 1612. The title has also an allusion to Mr. Selden's "*Duello*."

IV. That the practice of **DUELS**, under the sanction of law, was the expedient of a rude age, and is to be justified only by the existence of an imperfect state of society.

V. That the perpetuation of **Duels** in the law of England, is to be attributed only to the difficulty of abolishing ancient and popular institutions, and to the popular prejudices which have sustained this institution in particular.

VI. That the process for obtaining from the Courts of Law an award of **Duel** is denominated an **APPEAL**; an **Appeal** or **CALL**, not *to* the Courts, but *of* an alleged offender.

VII. That in their original institution, **Appeals** were only an alternative, or *one* of the modes of obtaining justice for wrongs; the person alleging himself to be wronged having his choice, either to appeal the offender to a **DUEL**, or to leave the offence to public justice.

VIII. That the use of **Appeals** for obtaining

SECOND CRIMINAL TRIALS, is an abuse of the ancient process, and a fragrant violation of the general principles of English jurisprudence; and has no foundation but in the *letter* of a statute of Henry VII, passed for a very different purpose, and under circumstances which forbade the resort to abstract right.

IX. That the use of Appeals for procuring second criminal trials is only one of many existing departures from their original design.

X. That Appeals are vicious from their principle, and vicious from the abuse of their principle.

XI. That they have no claim to protection as parts of our administration of justice.

XII. That they are equally destitute of recommendation as pretended parts or supports of our CONSTITUTION; and,

XIII. That **DEATH**, or Trial by Battle, is essen-

tial to the due administration of justice under the barbarous law of Appeal; that it would be a most fatal mistake to attempt the support of the process of Appeal, and yet remove the DUEL, or Trial by Battle; that in the whole matter we have an ancient total, of which we ought not to take the parts separately; that we must not manufacture, out of a barbarous ancient proceeding, something more barbarous still, of modern invention; and that we must not permit, by any oblique course, the adoption of a rule, such as, presenting itself directly and distinctly, we should cast from us with scorn and resentment.

In addition to the detail of these principles, let us add a supplication, that the apologist for for Trial by Battle, or that which constitutes the very essence of the process of Appeal, may not be mistaken for an advocate, either for Trial by Battle, in general, or for its acceptance and performance on any particular occasion. But to maintain the Trial by Battle, appears to be, at the present time, the only mode of arresting an Appeal. Let the King's Courts, then, tell

Appellors who come before them, that they have been mistakenly advised; that they have ignorantly asked for Battle; that they have no alternative, but to abide by the challenge which they have uttered, and the pledges which they have given, or to withdraw from the suit, with the least possible damage which the case will allow; and let Parliament abolish the process of Appeal, or at least so modify the process of APPEAL OF MURDER, as to prevent its application to the purpose of second criminal trials. Let us, at least, have ONE law, and one TRUE and GENERAL law, for *one* offence, and for *general* punishment. This will remove one enormous evil, though it will leave others, more enormous still, behind.

There can, indeed, be little reason to fear, that in any event, this modified expectation will not be fulfilled by Parliament: the *judicial* question is entirely simple; the *constitutional* one may have some intricacy. It may be thought to present a choice of evils; though the choice ought to be easily made. As to the *judicial* question, the prevention of SECOND Criminal Trials, whatever

profundity it may seem to have to the country, it will assuredly present none to Parliament. No Member of either House will stand up in his place, and say, **THAT SECOND CRIMINAL TRIALS ARE TO BE ENDURED** *.

For the Author of this sketch, he will be well content to stop at what is now done ; that is, at the glimpse and threshold of the facts, still hastily and imperfectly drawn out. But, should the public entertainment of the question appear to render further information necessary, he will

* It is worthy of remark, how many absurdities are commonly afloat in society, in the intervals of the sittings of Parliament, and which vanish as soon as its meeting takes place. It affords a strong contrast, to observe, how small is the degree of instruction which the public derive from the whole labours of the political press, for the entire year, when the amount of this is placed against that which the same public derives from the reports of the debates in Parliament for the few months of its session. In Parliament, the justness and depth of thinking, and the extent of political learning and information, which so often mark the speeches of members of either house, call for the highest admiration. In the debates of the late session, we may particularize the speech of the Earl of Lauderdale on Sinecures ; that of Lord Castlereagh on the Poor-Laws ; and that of the Marquess Wellesley on Parliamentary Reform.

resume his task, humbly tendering the small contributions of which he is capable, to place in their true light its history, law and policy, and to rid, at last, the Laws and Constitution of England of the foul blot of Appeal.

London, January 19, 1818.

ERRATA.

At p. 94, l. 14, *for* “make him acknowledge it,” *read* “make
it manifest.”

p. 253, note, *for* “constitution,” *read* “constitutions.”

Appellors who come before them, that they have been mistakenly advised; that they have ignorantly asked for Battle; that they have no alternative, but to abide by the challenge which they have uttered, and the pledges which they have given, or to withdraw from the suit, with the least possible damage which the case will allow; and let Parliament abolish the process of Appeal, or at least so modify the process of APPEAL OF MURDER, as to prevent its application to the purpose of second criminal trials. Let us, at least, have ONE law, and one TRUE and GENERAL law, for *one* offence, and for *general* punishment. This will remove one enormous evil, though it will leave others, more enormous still, behind.

There can, indeed, be little reason to fear, that in any event, this modified expectation will not be fulfilled by Parliament: the *judicial* question is entirely simple; the *constitutional* one may have some intricacy. It may be thought to present a choice of evils; though the choice ought to be easily made. As to the *judicial* question, the prevention of SECOND Criminal Trials, whatever

profundity it may seem to have to the country, it will assuredly present none to Parliament. No Member of either House will stand up in his place, and say, **THAT SECOND CRIMINAL TRIALS ARE TO BE ENDURED***.

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AN ARGUMENT,

&c. &c.

1. IT is an universal maxim of the Common Law of England, that no man is to be put into jeopardy of his life more than once, upon one and the same imputation of guilt. In civil causes, the plaintiff, as well as the defendant, may apply for a new trial. In criminal causes, a single trial is final ; and the policy of this rule of law is obvious. The quieting of all legal controversies is the first object in view, and a regard for the peace and comfort and personal liberty of individuals is the second. In the decision of every suit, one of the parties must be foiled. In questions of property, a renewed attempt at success, on the side of either party, is attended with less inconvenience ; but in criminal ones, repeated efforts against the life, liberty and reputation of the subject, are not to be endured. The matter at issue, therefore, is put, at once, into the hands of " God and the country." Human evidence and human judgment are resorted to for the discovery of the truth ; the divine aid is

implored and confided in; and the verdict of the Jurors (thus presumed to be assisted both by earth and heaven) is conclusive. "God and the country" have been appealed to; public justice is satisfied; the accused has submitted to his ordeal; and the decision, be it what it may, is final. Various views (without impeachment of our faith or of our piety) may be taken of the effect of the appeal to "God;" but if we believe, that humanly speaking, the verdict of a Jury is not infallible; that morally, it cannot always be conformable with the truth; still, every argument of reason and public policy require, that legally, it should be held to be the truth. In appealing to that verdict, every prescribed human effort has been made; the investigation of criminal charges must stop somewhere; and the policy of the law, as intimated before, much rather pursues the quieting of men's minds, and the general administration of justice, and over-awing of crimes, than the destruction of any particular presumed offender. A further objection to a second trial in criminal cases (though to be more expressly considered below) cannot be omitted here. It is obvious, that upon every principle of justice, if the prosecutor, after a verdict of acquittal, were allowed to demand a second trial, the prosecuted, after a verdict of condemnation, must be allowed to demand it also. To go no further, at present, with the con-

sequences of this reciprocal indulgence, it is plain, that its practice must be at variance with the *quieting* policy of the law, at the same time that no prospect of *general* assistance to justice could be afforded by it. Morally speaking, there are many reasons why a second trial should be as unsatisfactory as the first.

2. But, though it is the positive and reasonable general rule of our criminal jurisprudence, that the accused cannot be brought to a second trial, a particular exception to this rule exists in the statute-books. In cases of murder, the law *sometimes* allows the *next heir* to appeal (or summon) a suspected person to a second trial, after, and in the face, of an acquittal by "God and the country."

3. The particular proceeding, by which the next heir of a person murdered is enabled to force the accused to undergo the risk of a second trial, is denominated an "Appeal." The Appellor, or summoner, obtains, from the Crown, a "Writ of Appeal;" that is, a writ of attachment against the body of the accused, in order to his answering the Appeal. The authority of this ancient and commonly neglected provision of our criminal law has recently been resorted to. Writs of Appeal have been sued out, in more than one of the King's Courts of Law. The provision, upon being, now, narrowly looked into, is found

to be incumbered with various particularities, all flagrantly at variance with modern manners and opinions. More especially, the accused is entitled to protect himself, at his option, by a resort to arms, under the name of "Wager of Battle." These particularities present difficulties which embarrass the suitors and the courts, and excite the curiosity and passions of the public. A strait path is endeavoured to be found; not, however, as it would seem, (and as far as the popular voice is concerned,) in order *to get rid of this monstrous attempt to bring a suspected person to a second trial*—but to remove obstructions which appear to oppose themselves to that proceeding. It is to attempt an entire reversal of this apparent public view of the question, that the following Argument is offered.

4. Much has been produced, for the purpose of popular information, upon the manner of conducting the Wager of Battle, upon the course pursued by the King's Courts in the most modern instances of its occurrence, and upon the exceptions which have been allowed, where the Appellor has refused to accept the challenge of the Appellee. But, amid these efforts to enlighten the public mind, nothing, I believe, has been set before it, to discover the *origin* and *history*, and consequently the *reason*, of the Appeal itself, and, thereby, to enable it to judge, first, whether the

Appeal ought to subsist, unaccompanied by the right of Wager of Battle ; and secondly, whether, at this day, it is not infinitely more important to devise the means of destroying the operation of the Appeal, (for which the Wager is, indirectly, an instrument,) than those of carrying it into effect? It is my wish to show, first, that the Wager is so essential a part of the *law*, as well as the *equity*, of the proceeding under the Appeal, that instead of seeking exceptions against its award, the fewest possible exceptions ought to be allowed ; and, secondly, that the Appeal, not less than the Wager, is a practice abhorrent to all the principles of enlightened legislation, and particularly to all the principles and spirit of English criminal jurisprudence. The practical result of the Argument will be, first, that the King's Courts, (they having no guide but the law,) since they cannot disallow the Appeal, should steadily uphold the Wager of Battle ; and secondly, that with all convenient speed, Parliament should abrogate the subject's right to the Writ of Appeal.

5. The *origin* of the Writ is to be traced in the manners, customs and institutions of the first stages of society, when, as at this day, among the Indians of America, public law is permitted to extend only to public objects ; pri-

vate wrongs are left to private redress, and the laws of the country go no further than to recognize the private right to indemnity or revenge, and therefore to bear harmless the individual who distributes, by his own hands, that justice which the arm of society (now incomplete and weak) is unable to afford him. In these stages of society, then, if a murder or other injury is committed, it is in all cases the right, and in some the natural duty, of every man to be his own judge and executioner. Thus, if, in these stages of society, a father, a wife, a child, or a sister, is murdered, it becomes the immediate right (we will not speak of the duty) of the son, the husband, the parent, or the brother, to take the life of the murderer. The community does not interfere; the wrong is held to regard only the blood of the deceased; if there is no surviving blood, the murder is unrevenged: but society, though it takes no part in the execution of justice, yet approves and protects the hand from which it comes, and even consigns to infamy the individual who, from cowardice, from indifference, or, from what it regards as a vicious compassion, is so wanting in piety to his injured relative, as not to pursue, or, pursuing, to forgive, the murderer. This belongs to the first stages of society. As nations unite more closely, as civil government is matured and strengthened,

new views are gradually inspired into society. On the one hand, the justice of treating every act of private violence as a public wrong is perceived; and, on the other hand, the inconvenience of suffering individuals to avenge their own wrongs is bitterly experienced. There results a determination to take the business of distributive justice into the hands of the public, and thence a necessary co-existing determination to take it out of the hands of individuals. The necessity of leaving it in those hands has ceased, and the evils, the sense of which has led to the new order of things, irresistibly call for suppression. But whenever, and wherever, a new order of things is established, there remain some traces and some partisans of the old. Public laws and institutions cannot instantaneously remove established private habits and opinions. Those habits and opinions, however ill-founded and mischievous, will sometimes be sanctioned by sentiments the most heroic and the most amiable. Above all, when they were well founded in a previous order of things, their want of adaptation to the new order cannot be both immediately and universally perceived. Not only the virtues, but the vices of men, may be engaged in the preservation of the ancient system. In the case of murder, men, in the rude state to which we have referred, have admitted the notion of a *civil injury* sustained by the *next heir* of the de-

ceased. The survivor experiences a loss of pleasure, of comfort, or of services*, from the act of the murderer. Hence the origin of fines and damages against the latter regularly come down to us from the savage state. But, the practice of satisfying the next of kin by means of money, or other civil compensation, having obtained†, individuals would be discontented, under the new order of things, at the destruction of their rights to these advantages, and at seeing fines wholly dispensed with, or else carried to the public treasury. It is after this manner that we should trace the *origin* of the existing right of Appeal. It is an indulgence wrung from the weakness of the law, in favour of old and

* This is still the language of our law, in the case of seduction of a wife or daughter; and men's opinions are at this time divided, whether these offences ought to be punished *civilly* or *criminally*.

† Among the Indians of America, the murderer may appease the wrath of the relations of the murdered by *covering the body*; a phrase which implies, at once, an elegant sentiment of *hiding* a distressful and irritating object from the eyes of its natural lovers and avengers, and a worldly satisfaction of the more sordid feelings of the injured, by offering an atonement in goods. The American Indians *cover the body* by heaping upon it clothing and trinkets, and other articles of value. In a similar manner, Alexander *covered the body* of Darius; and Antony, when he wished to inflame the people of Rome against the murderers of Cæsar, *uncovered the body*, and laid bare its wounds.

vicious habits, at variance with the new system, but too strong, for a season, to be wholly withstood. Neither are we, perhaps, to turn away from our consideration of the *origin* of the Appeal, until we have surveyed it under a third aspect. We must here treat it as a grant to the unsettled habits of the people, unaccustomed to leave their causes in the hands of the public, untaught to identify crimes against individuals with crimes against society, and especially unreconciled to confide the determination of that which they would think belonged so emphatically to themselves, and to their own blood, to the decision of others and of strangers—and unwilling to submit their causes, in the last resort, to the judgment of any neighbours, however respectable, or to the arm of any authority, however exalted. From the original state of society, just described, resulted and result those wars of families, recalled, in this kingdom, by the mention of the words *clans* and *feuds*; and from the difficulty of obtaining an early and ready submission to the judgments of public courts, must have sprung the unwilling and temporizing continuance of Appeals. In reality, this view brings us almost to our own times, and to the very use which is now sought to be made of the Writ of Appeal; not, exactly, to arm the private executioner, but to procure a revision of, and *appeal from, the Verdict of a Jury.*

6. It is of great importance that we should acquaint ourselves thoroughly with the true history of this first period of the Law of Appeal. Proceeding on that foundation, we shall presently discover, that the law has had *three periods*, each *increasing*, (and not *decreasing*,) in barbarity, and that it is our own lot to witness the latest and the worst.

7. The *first period* was that in which the Law of Appeal was a simple recognition of what we have seen to be the general practice of the savage state; a mere acquiescence, on the part of the civil magistrate, in the natural right of the individual to be the avenger of the wrongs under which he laboured; and a total absence of that principle in jurisprudence, which regards all acts of violence against private persons (all breaches of the peace) as crimes against the public. Blackstone quotes Lady Wortley Montague, to show, that in Turkey, it is the business of the next relations, and of them only, to avenge the slaughter of their kinsmen; and that if they rather chuse to compound the matter for money, nothing more is said about it*. This is a state of law which belongs to the second stage of society, and this state once subsisted in England.

* Lady M. W. Montague, Lett. 42. Blackstone, book iv, ch. 23.

8. It is by recurring to this original state of the law, that we come to a clear understanding of the signification of the word "Appeal," as used on the present occasion, and as contradistinguished from that of the same word "Appeal," as ordinarily employed in our language. "An Appeal," (as remarked by Blackstone,) does not signify, in the sense in which the word is here used, any complaint to a superior court of an injustice done by an inferior one, but means an original suit. The word is derived from the French "*appeler*," the verb active, which signifies, to call, or summon*. Now this is entirely plain, if we consider the "Appeal" as being, in its original constitution, (what alone can reconcile it with reason,) a proceeding necessarily *antecedent* to any other, or, more properly, *alone, and final in itself*; and that this, and this only, was the design of our forefathers, and that the rest is but modern barbarism, will soon distinctly appear.

9. The *second period* of the English Law of Appeal is that which commenced when acts of violence, committed upon individuals only, were first regarded and treated both as *private* and as *public wrongs*, and terminated with the date of the Statute of the third year of Henry VII, Chap. I. This twofold view of the crimes in

* Blackstone, book iv, ch. 23.

question, on the one side as *private* wrongs, and on the other as *public*, continues to this day*; but the modern law, in virtue of which the private prosecution lies, after the public one has been had, is to be dated only from Henry VII†.

* Blackstone, in one passage, calls the Appeal, a “ *private* process for the punishment of *public* crimes;” and though these expressions are borne out by the terms of the Appellor’s count of Appeal, wherein the offence is charged to be against the peace of the King, yet it is still, in practice, what it was at first in theory, a *private* process for a *private* wrong; and it was with greater practical accuracy that the learned writer had just before represented, that “ an Appeal, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, demanding punishment on account of the particular [*private*] injury suffered, rather than for the offence against the *public*.” *Comment. book iv, ch. 23.*

† “ Laws were passed in this reign, ordaining the King’s suit for murder to be carried on within a year and day. Formerly, it did not usually commence till after; and as the friends of the person murdered, often, in the interval, compounded matters with the criminal, the crime frequently passed unnoticed.” *Hume’s History of England, temp. Henry VII.*

“ There was made, also, another law, for peace in generall, and repressing of Murthers and Man-slaughters, and was in *amendment of the Common Lawes of the Realme*, being this: That whereas by the Common Law, the King’s suit, in case of homicide, did expect the yeare and the day, allowed to the parties suit by way of Appeale; and that it was found by experience, that the partie was many times compounded with, and many times wearied with the suit, so that in the end such suit was let fall, and by that time the matter was in a manner forgotten, and thereby prosecution at the King’s suit by indict-

10. Up to the time now mentioned, the law, if it had been inefficient, had, at least, been neither absurd nor cruel. But, in addition to its other vices, it had gradually become inefficient, as to the ends of public justice; and it is to the difficulty which, naturally enough, existed, in the time of Henry VII, to adopt a complete remedy, that we owe the disgraceful statutory innovation, upon the best principles of our Common Law, to the present hour remaining. Omitting (even if we were able) to follow minutely the history of the Law of Appeal, we may content ourselves with bringing together a few leading and useful facts. The Appeal, as a remain of the savage state, has always been a favourite with the people, and always an object of just aversion with the government. The embarrassment has been, how to abolish it, without offence to the public prejudices. To abolish it has always appeared a public good, but a public good to be obtained only by the sacrifice of private rights. The people have regarded their trespassers as their debtors; and it has appeared to them, that Parliament has no more right to dispossess them of the power of prosecuting those who are guilty

ment (which is ever best, *flagrante crimine*) neglected; it was ordained, That the suit by indictment might bee taken as well at any time within the yeare and the day, as after, not prejudicing, nevertheless, the partie's suit." *Lord Bacon's History of the Reign of Henry VII*, p. 65.

of felonies against them, than of that of suing those who owe them money, or who detain their goods. Hence the necessity of temporizing. The right of Appeal has not been abolished, but it has been gradually restricted. This enlightened policy, however, comes down only to a certain date. To more recent times belongs the dishonour of aggravating the evil of Appeals.

11. The law of murder, in England, at and up to the beginning of the reign of Henry VII, exhibits only a few successive removes from that which has just been described as the law of Turkey*. Murder, together with other felonies,

* The example of Turkey is more german to the matter than may at first sight appear. Englishmen and Turks are alike members of the great Asiatic family, and the basis of social law is the same, from the banks of the Caspian to the Pacific Ocean on the one side, and to the Atlantic on the other. Blackstone suggests that our *unwritten* law has descended to us from the Druids; but this supposes its root to be with the Britons, rather than with the Saxons; with the Celtic, rather than the Teutonic race. That the Druids came to us from the Mediterranean, is proved by the natural history of the oak and the mistletoe, as well as by their seat in the island of Anglesea, whence they spread their missionaries into Gaul, rather than drew them from Gaul into Britain. The mistletoe is rarely natural to the oak in our climate, but it is abundantly so in the south of Europe¹, and in Britain it was artificially cultivated on

¹ See Coldbatch on the Mistletoe.

had been early recognized as a public wrong, but it had been left with its character of a private wrong also. The consequence was, that prosecutions by the Crown had been admitted, while prosecutions by individuals were still allowed. But the mischief of private prosecutions had been felt, and various limitations to their exercise had been successively established. The rational attempt to lead the people to a more sane system of jurisprudence had been pushed as far as possible; and, in the midst of the worst circumstances, the great and sacred principle of the Common Law, That no man shall be put into jeopardy of his life more than once, upon the same charge, had never been violated. Our early forefathers, barbarians as we are pleased to call them, had still the sense

that tree, by the hands of the Druids themselves. In the south, the oak was the tree of God, as, more southerly still, was the palm; but the ash was the sacred tree of the north, and the mistletoe could scarcely have been in much esteem with the Scandinavians, since it was with an arrow of that plant that Loke killed Balder¹. Still, whether our laws came from the south or from the north, by the Mediterranean, or by the plains of Poland, they were Asiatic; the Britons and the Saxons had their origin equally in Asia; and the history and meaning of the laws common to both, might doubtlessly find illustrations in the deserts of Tartary, from the judgments of Kublai Khan, and from the comments of the sages of the Golden Horde.

¹ Fables of the Edda.

and the virtue to shudder at the enormity of making the same criminal charge the subject of a second trial. There were no second trials. The individuals, to whom, in cases of murder, was still conceded the right of *appealing*, were allowed *a year and a day* for its exercise. *Within that period, the Crown could not prosecute.* If, within that period, the *Appeal* was made, the accused was put upon his trial, either by Jury, or by other lawful mode of decision. Whatever the decision was, it was final. *The Crown was unable to prosecute after trial on Appeal.* If, on the other hand, the period of a year and a day, from the date of the murder, went by, without Appeal by the wife, or heir lawfully entitled to make it, then the Crown could lawfully prosecute. In this state of the transaction, the right of Appeal had lapsed, and therefore *no Appeal could be brought after the public prosecution.* Thus, the prosecution by the Crown was equally final with the prosecution by Appeal; and the accused, in either case, was safe from a second trial.

12. The mischiefs which were experienced from the subject's right of Appeal were alternately of various description; first, an oppressive exercise; secondly, a supine indifference; thirdly, a neglect, arising out of the inability, in many instances, of private persons, to avail themselves of it; and fourthly, a sordid application:

all defeating, in one form or other, the ends of public justice. Here, upon light grounds, an innocent person was accused and destroyed; there, an indolent natural prosecutor left a notorious criminal at large: in one case, the poverty, or remote situation, or unwillingness to encounter the perils of a prosecutor, or the altered habits of society, absolutely prevented, or effectually deterred, the lawful avenger of the deceased person from every effort against his murderer; in others, the wealthy criminal easily compounded with the avaricious and selfish prosecutor. It was the union of all these circumstances that led to the fatal alteration of the law, by Henry VII, in whose Statute, already adverted to, the case is thus set forth:—" *Item*, the King, remembring how murders and slaying of his subjects daily increase in this land, the occasions whereof be divers: one, that no man, in townes where such murder happen to fall and to be done, will attach the murderer, where the lawe is, that if any man be slaine in the day, and the felon not taken, the towneshippe where the death or murder is done shall be amerced. And if any man be wounded in perill of death, the partie that so wounded should be arrested, and put in suretie till perfect knowledge be had, whether he so hurt should live or die. And the Coroner, upon the view of the bodie dead, should inquire of him or them that had done that death or

murder, or their abettors and consenters, and who were present when the death or murder was done, whether man or woman, and the names of them that were present, and so found, to inrol and certifie; which law, by negligence, is disused, and thereby great boldnesse is given to slayers and murderers: And over this, it is used, that within the yeere and day after any death or murder had and done, the felon should not be determined at the King's suit, for saving of the partie's suite; wherein the partie is oft time slow, and also agreed with, and by the end of the yeere all is forgotten: which is another occasion of murder. And also, he that will swear Appeal, must sue in proper person, which suit is long and costly, that it maketh the partie appellant wearie to sue." The Statute, then, proceeds to make an *alteration in the ancient law*, as follows:—"For reformation of the premises, the King, &c. will, that every Coroner exercise and doe his office according to the law, as is afore rehearsed. And that if any man be slaine or murdered, and therefore the slayers, murderers, abettors, maintainers and comforters of the same be endyted, that the same slayers and murderers, and all the accessaries of the same, be arraigned and determined of the same felony and murder, at any time, at the King's suit, within the yeere after the same felony and murder done, and not tarry the yeere and day

for any Appeale to be taken for the same felonie or murder. And if it happen any person, named as principall or accessory, to be acquitted of any such murder, at the King's suit, within the yeere and day, that then the same Justices, before whom he is acquitted, shall not suffer him to goe at large, but either to remit him againe to prison, or else to let him to baile, after their discretion, till the yeere and day be passed. And if it fortune that the same felons or murderers, and accessories, so arraigned, or any of them, to be acquitted, or the principall of the said felonie, or any of them, to be attainted, the wife, or next heire, to him so slaine, as case shall require, may take and have their Appeale of the same Death and Murder, within the yeere and day after the same felony and murder done, against the said persons so arraigned and acquitted, and all other their accessories, or against the accessories of the said principall, or any of them, so attainted, or against the said principalls so attainted, if they be on live, and the benefit of his clergie thereof before not had. And that the Appellant have such and like advantage, as if the said acquittal or attainder had not beene, the sayd acquittal or attainder notwithstanding. And over that, the wife, or heire, of the said person so slaine or murdered, as case shall require, may commence their Appeale, in proper person, at any time

within the yeere after the said felony done, before the Sherife and Coroners of the countie where the said felony and murder was done, or before the King in his Bench, or Justices of Gaole Deliverie. And the Appellant, in any Appeales of Murder, or Death of a Man, where Battell, by the course of the Common Lawe, lieth not, may make their attornies, and appeare by the same, in the said Appeals, after they be commenced, to the end of the suit, and execution of the same*.”

13. Thus we have arrived at the *third period* of the history of the Law of Appeal, and the following is what we have now discovered:—

1°. That the law originated with the infancy of society, when breaches of the peace, having no further object than the injury of individuals, were not regarded as *public wrongs*.

2°. That the first advances of civilization produced three changes of the ancient practice; namely, the adoption of breaches of the peace, of the character now described, into the list of *public wrongs*; the consequent punishment of them by *public prosecution*; and the limitation of the *private prosecution* to the period of a year

* Anno 3 Hen. VII, cap. i. Rastell's Statutes, p. 282.

and a day, counting from the date of the commission of the offence. This is our Common Law.

3°. That originally there was but *a single trial*, on the private prosecution; and that under the first changes there was still but *a single trial*, the Crown being obliged to wait a year and a day for the private prosecutor; the private prosecution, if carried into effect being final against the Crown, and the public prosecution (the right of private prosecution having lapsed before its possible commencement) being final against the Subject. Thus far, too, our Common Law. But,

4°. The Statute of the third year of Henry VII, passed for the remedy of serious inconveniences of the Common Law, and amid the impossibility (through the public habits and prejudices) of establishing at once a rational system of public justice, effected this barbarous innovation on the Common Law,—That while it gave to the Crown the desired power of immediate public prosecution, it saved the Subject's right to private prosecution, during the customary term of a year and a day, provided that there was an acquittal on the trial at the King's suit.

14. But the perversion of the ancient law—the violation of the principles of the Common Law—has not stopped where we now are. The *third*

period is one of yet ruder barbarism. The Law of Appeal remains, as to legislative enactments, where it was left by the Statute of Henry VII; but the decisions of the Courts, and the comments of modern lawyers, have since lent their assistance to the increase of the evil. Blackstone is surely in error, as far as concerns that Statute, with respect to his view of the *reason* of the continuance of the private process. After deducing the origin of the process from the times “when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or to his relations, to expiate enormous offences,” he observes, “As, therefore, during the continuance of this custom, a process was certainly given, for recovering the *weregild* by the party to whom it was due; it seems, that when the offences grew no longer redeemable, the private process was still continued, *in order to insure the infliction of punishment upon the offender.*” It is this principle, of *insuring the infliction of punishment upon the offender*, that constitutes the modern and last perversion of the ancient law, and for which, as is here contended, the Statute of Henry VII is indeed the tool, but not the authority. No such principle received the sanction of the framers of that Statute. Their noble and well-taught minds (minds aiming at pure justice, and fully imbued with the maxims of our Common Law) never contemplated the private process as a

happy medium for defeating an acquittal under a prosecution of the Crown; as a precious engine for disturbing the Criminal Verdict of a Jury; as a fortunate weapon by which the peace and liberty of a subject of the realm could be newly molested, and by which, here and there, in a few partial instances, and under casual and partial circumstances, the life of an individual, perhaps only *found guilty of being suspected**, could be remorselessly taken away! Their noble and well-taught minds would have shrunk from a voluntary assault upon the bulwark of the Common Law, which says, that *no man shall be put into jeopardy of his life twice, upon one criminal charge*; and least of all would they have voluntarily made a breach in that bulwark,—not for the general purposes of public justice; not for the establishment of a rule which should operate alike upon like cases; which should have for its object *all murders*, and for its victims *all murderers*; but for one which should have no effect but in a few arbitrary instances, should be dead but to a few privileged prosecutors, and should strike but a few unlucky delinquents! They were above such paltry designs; all the objections to *a second criminal trial* were as present to their understanding as to ours; the Common Law was their guide, as it should be ours: but it was their hard

* Goldsmith.

lot to be obstructed in their progress by the stumbling-block of an ancient custom: the times permitted them to do no more than they did; but they did all that they could; and they left to their children an example, which, hitherto, there has been a want either of sense or of virtue to follow. It was no principle of theirs, that the *private process should be continued*, in order to insure the infliction of punishment upon the offender, (to accuse and try again the man whom “God and the country” have acquitted,) but they continued it, under all the restraints they could apply, as an evil which their age did not allow them wholly to obliterate; in like manner as it is the ignorance, and perhaps the faction, of times otherwise more favourable to its abolition, that has hitherto, not only preserved the institution, but applied (misapplied) it to purposes that would have filled our ancestors with shame and indignation.

15. The difference of sentiment, between our early forefathers and our immediate predecessors and contemporaries, upon the merits of the Law of Appeal, is matter of record. All the restraints upon its operation are ancient; all the extension of its principle is modern. The ancient restraints successively limited, 1. In general, the occasion of its use; and 2. The description of those who could use it. Our ancestors regarded it as a nuisance; we, as an ornament. There is no

statute nor written law in which it is established; and scarcely one which does not go to take something from it*. This was even the design of the third of Henry VII, however unavoidable the opposite consequence which has followed. It is probable that the Norman conquest introduced, along with the feudal system, the extension of Appeals to matters of offence against the state. The unsocial principle, that acts of violence, com-

* It has been represented that the right of Appeal has some basis in the provisions of Magna Carta, a fact which, if true, might throw difficulty in the way of a legislative abolition. But Magna Carta is silent on the subject of the right of Appeal, except as to the purpose common to so many other parts of our written law, namely, that of narrowing its lawful exercise, and repressing its abuses. That instrument only provides, that "No man shall be attached nor imprisoned upon the Appeal of a woman, for the death of any other man than her husband." "*Nullus capiatur nec imprisonetur propter Appellum femine, de morte alterius quàm viri sui.*" A Statute of Edward I, in the mean time, affords some protection to the right of Appeal, but, in so doing, shows, that the Courts of Law had been unfriendly to it; a disposition which its abuses (if nothing else) will presently account for. By one of the Statutes of Gloucester, "it is provided, that no Appeal shall be abated so sleightly as they have been heretofore, but if the Appelor declare the deede, the yeare, the day, the houre, the time of the King, and the towne where the deede was done, and with what weapon he was slaine, then the Appeale shall stand in effect, and an Appeale shall not be abated for default of fresh suit, if the party sue within the yeere and day after the deed done. *Glouc. cap. 9. anno 6. Ed. I.*" *Rastell's Statutes*, p. 116.

mitted against individuals only, are not public wrongs, was exchanged, under the feudal system, for one that forms the opposite extreme. Crimes against the prince or state may be said to have been then taken as *private wrongs*, and loyal individuals undertook to appeal the offenders, and to prefer, at their own peril, the charges to be made against them. The Law of Appeal was then in its more vigorous stage of existence. Any subject might then appeal another subject of high treason, either in the Courts of Common Law, or in Parliament; or (for treasons committed beyond the seas) in the Court of High Constable and Marshal, or of Chivalry. From this stage Appeals have gradually declined. The cognizance of Appeals in the Court of Chivalry still continues in force; and, so lately as 1631, there was a trial by Battle awarded in that Court, on such an Appeal of treason: but that in the Courts of Common Law was *virtually* abolished by the statutes 5 Edw. III, c. 9. and 25 Edw. III, c. 24. and in Parliament *expressly*, by stat. 1 Hen. IV, c. 14; so that the only Appeals now in force, for things done within the realm, are those of felony and mayhem*. But, beside the general reduction of

* Blackstone. "Appeal of *felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *larciny*, *rape*, and *arson*. And for these as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt,

the occasions of Appeal, still more important reductions have been gradually made in the description of persons capable of bringing it; reductions which must appear inconsistent with sense and justice, if we do not explain them by adverting to a policy, the constant object of which was the total abolition of Appeals, as far as circumstances, from time to time, permitted. An Appeal, says Blackstone, cannot be brought by every *relation*; but only by the *wife* for the death of her husband, or by the *heir male* on the death of his ancestor; which heirship was also *confined*, by an ordinance of Henry I, to the four nearest degrees of blood*. It is given to the wife on account of the loss of her husband: therefore, if she marries again, before or pending her Appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution †. Complaints of abuses of Appeal are of perpetual

may institute the private process." The Learned Commentator adds, "that the only crime against one's relation, for which an Appeal can be brought, is that of *killing* him, by either murder or man-slaughter;" but, according to Comyns, vol. i, p. 504, A 3, an Appeal may also be brought for rape, by a husband or male relation.

* Blackstone, iv, 23. *Mirr. c. 2. § 7.*

† Blackstone. "1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the Appeal. 2. If there be no wife, and the heir be accused of the murder, the person who, next to him, would have been the heir male, shall bring the Appeal. 3. If the wife kills her husband, the heir may appeal her of the death."

recurrence, and evince, in conjunction with the restraining enactments, with how much disfavour they were viewed*.

* "From henceforth, a wryt [to here and determine Appeales before Justices assigned] shall not be graunted but in a specyall case, and for a cause certayne, when the Kyng commaundeth; but leste the partyes appealed or indyted be kepte longe in pryson, they shall have a wrytte of *Odio et atia*, lyke as it is declared in Magna Carta and other Statutes." *Anno 13 Ed. I. cap. xxix.*

"Henry, Kyng of England, &c. to his Chauncelor in the County Palatyne of Lancastre, gretynge. Know ye, that for as much as dyvers men, of malyce and enemytie, and for gayne and vengeance, have often caused to be indyted and appealed dyvers of our true liege people, of treasons or felonyes in the Countie of Lancastre, pretendynge, by those Appeales and Endytementes, that the said treasons or felonyes were committed in a certeyn place, where of trouthe no suche place is had in the sayd Countie where the sayd Appelle and Endytement is made, to the great damage and peryll of such our liege people, consydering that some so appealed and endyted doe not appeare before the Justices in theyr proper persons, to answer thereof, for fear of beatynge, mayhemynge, or sleynge of them, by the conspiratours or procurours of the same Appeales and Endytementes, as by the Comens of the realme of England, in our last Parlyament, holden at Westmynster, by theyr peticyō ther exhibit, greuously cōplaining, was shewed; It is ordeyned in the same Parlyament, by the assent of the prelates and great men of the same realme there beyng, at the requeste of the sayd Comens, for the comen profyt and quyetnes of the people of the same realme, that every Justice, which hath power to heare and determyne such treasons and felonyes within the sayd Countie, by the othe of xii men, of whom every shall have frehold in the same Countie to the yerely valour of £ s.

15. Our history is now to terminate with the modern uses and views of the Writ of Appeal, as they are to be traced since the establishment

above all charges, before that the exigend be awarded, without allegacyon of the partye, as well in the partie's absence as his presence, shall enquire of office, Whether any suche place be in the Coûtie where such Appeles or Endytemente be made or not. And if it be found, that there is no such place within the same Countie, thā suche Appeles and Endytementes, and the processe thereof, made or to be made, shall be voyde and holden for none. And that in such case the endytours aforesayd be punished by imprysonement, fine and ransom, by the descrecyon of the said Justices. And that this present ordynance and remedy extend as well to Appeales and Endytements to be taken hereafter. And if any exigend from hensforth be awarded, before that such inquysicion of office (as afore is sayd) be taken, that the same exigende, and the awardyng thereof, be lykewyse voyd and holden for none. Provyded that this present ordynaūce have strength and extend onely untill the next Parlyament." *Anno 7 Hen. V.*

In the 9th year of the same reign, this Act was confirmed and ordered to remain in force until the parliament after the King's return from beyond sea. 9 Hen. V, cap. 1. and made perpetual, 8 Hen. VI, cap. 12.

"Appeals having been frequently brought in Counties where the persons so appealed did not live, and outlawry obtained against them, without their knowing of it, an Act was passed in the 8th of Henry VI, for reforming such abuses, and enacting that if the defendant did not appear to the first writ, a second should be issued three or four months (according to the time when the Courts were held, whether every month or six weeks) after the date of the first, and that the Sheriff should make proclamation in two Counties, and if the party appeal not when the last writ is returnable, then an award against him

of the perverse principle, that it is continued in order to insure the infliction of punishment upon an offender*. The objections to this principle, and its total novelty, and modern creation out of the Law of Appeal, form one of the principal topics of this Argument; but it is impossible not to be arrested, from time to time, by the mortified feelings with which we contemplate it, when adopted into our Courts of Law, in the face, not only of one, but of all fundamental maxims. The law not only revolts from a second criminal trial, but it is at all times solicitous for the preservation of life. Its constructions are always

may issue." This Act was further confirmed the 10th of the same reign.

Blood-money seems to have been well understood, so long ago as the reign of Edward III; and indeed the Law of Appeal is a direct incitement to the offences which that term infers:—

“ To eschewe the dammage and destruction that often doth happē by Sherifs, Jaylours, and keepers of prisons, within franchises and without, which have pained their prisoners, and by such evill meanes compell and procure them to become appealours, and to appeale harnelesse and guiltlesse people, to the intent to have ransome of such appealed persons, for fear of imprisonment or other cause; the Justices of either bench, and Justices of assize and gaole deliverie shall, by force of this statute, enquire of such compulsions, punishments, and torments, and heare the complaints of all them that will compleine by Bill. And to heare and determine such plaints, as well at the writ of the party, as at the King's suit. *Anno 1. Ed. III. cap. 7.*” *Rastell's Statutes*, p. 367.

* See before.

in favorem vitæ. It catches at every straw on the side of the culprit. Yet, in spite of these ordinary rules, what lamentable things have not been done in our Courts, under colour of the Law of Appeal, from a forgetfulness of principles, and from a passion (fit only for the vulgar) “to insure the infliction of punishment upon the offender!” The Statute of Henry VII provides, that an Appeal shall not lie against one who has been convicted of *man-slaughter* upon an indictment, *and has had his clergy*. In the known instance of Goring and Deering, Deering was convicted of man-slaughter, but the granting his clergy was respited, expressly to leave him exposed to the operation of an Appeal of Murder! Lord Chief Justice Holt condemns the decision of the Judges upon that case*; yet was himself

* “Armstrong v. Lisle. Appellee was brought to the Bar, and it was moved, that he might have his clergy, on his conviction of man-slaughter, on an indictment whereon he was tried last Assizes for Cumberland; and *per Holt*, there have been resolutions, that the Judges may defer the allowance of clergy, to expose him to an Appeal. In the case of Goring and Deering, the prisoner was convicted of man-slaughter; clergy respited; an Appeal brought; he pleaded all this matter; but his plea was disallowed, by advice of all the Judges, and I tried him on the Appeal: but I must confess I was never satisfied with that resolution, being of opinion, that it is the duty of the Court to allow the prisoner his clergy the same Assizes or Sessions wherein he is convicted. *Hilary Term, 3 W. III. 1696.*” *Modern Reports, vol. XII, p. 109.*

“If the defendant, on an indictment, is convicted of man-

so satisfied with the principle, that Appeals are continued "in order to insure the infliction of punishment on the offender," that in the remarkable case of Christopher Slaughterford, acquitted on an indictment of murder, "he *ordered*," says the Reporter, "an Appeal to be brought against him*." Chief Justice Holt had before him the example of Mr. Justice Harvey †. But conclusive evidence of the unfortunate view which the Courts

slaughter, and allowed his clergy, it will bar an Appeal: though some of our books tell us, the heir may lodge an Appeal immediately before clergy had; and others say, clergy ought to be granted, and that it is unreasonable an Appeal should interpose presently to prevent judgment." 3 *Inst.* 131.

"If a person, immediately after the verdict of man-slaughter, put in an Appeal of Murder, and, before the Appeal is arraigned, the defendant demands his benefit of clergy, this is a good bar to Appeal; and praying of clergy is having of clergy, though the Court delay calling the party to judgment, &c. 1 Salk. 69, 62. Kel. 93. But formerly it was held, that the Courts might delay calling a convict to judgment, and thereby hinder him from his clergy, and make him liable to an Appeal, especially if the Appeal were depending; and where the record of a conviction of man-slaughter is erroneous, or insufficient, &c. the offender cannot plead the conviction and clergy had thereon, in bar of an appeal or second indictment, &c." 2 *Hawk. R. C.* 378, 379.

* Modern Reports, 8 Ann. p. 217; a marginal note is properly added, "Si juste?" It is probable, however, that the Chief Justice did no more than *recommend* an Appeal, and *order* the prisoner to be detained under the Statute of Hen. VII.

† Norkotts and Okemans.

have ordinarily taken of the duty imposed on them by the Statute of Henry VII, appears from their decisions on the question of BAIL. "The Court," it is said, (Strange's Reports, 855,) "will bail in all cases of acquittal on an indictment, *unless the Judge be dissatisfied with the acquittal.*" I venture to assert, that the Judge's satisfaction or dissatisfaction with the acquittal ought to have no influence on the question of bail. The words of the Statute are, "And if it happen any person, named as principall or accessary, to be acquitted of any such murder, at the King's suit, within the year and day, that then the same Justices, before whom he shall be acquitted, shall not suffer him to go at large, but either to remit him again to prison, or else to let him to bail, after their discretion, till the year and day be passed." Now, in this enactment, the direction, not to suffer the acquitted person to go at large, till the year and day be passed, is peremptory; what is left to the discretion of the Justices is only, whether "to remit him again to prison, or else to let him to bail." And how have our Courts conformed themselves to this regulation? What authority has been put into their hands, to express their satisfaction or dissatisfaction at any man's acquittal at the King's suit? Who has empowered them to remit one acquitted person again to prison, and yet suffer another acquitted person to go at large? Who has given them the use of

their “discretion” upon this point, and what is it they have done? They have undertaken to act upon their view of who ought and who ought not to be put on a second trial! They have admitted into our jurisprudence the principle, that the law can look with favour upon a second criminal trial! But how different, how preferable, is the obvious intention of the Statute! The Statute separates no man’s case from another man’s case; it deals an equal measure to all; it says, that no person acquitted at the King’s suit shall be suffered to go at large till the year and a day be passed, but that every such person shall either be remitted to prison, or let to bail, “after the discretion of the Justices.” Now the Justices have, in the first place, exercised their “discretion” upon that point in relation to which the Statute gives them no “discretion,” namely, the suffering acquitted persons to go at large, dismissing some, and detaining others, according to their particular view of the guilt or innocence of such acquitted persons! Again, in what manner have they exercised the “discretion” really intrusted to them, “either to remit such acquitted persons again to prison, or else to let them to bail?” Why, they have construed this “discretion” as having reference to their private views of the real guilt or innocence of the acquitted person—and, if the intention of the Statute was that of promoting second criminal trials, or if they were

justifiable in yielding themselves to the promotion of such trials—they have done rightly. But would it not have satisfied the words of the Statute, if they had confined their “discretion;” if they had confined the acceptance or refusal of bail—to the single consideration of its sufficiency or insufficiency for insuring their hold on the acquitted person, so that he might be certainly kept from “going at large till the year and day be passed?” Is not the safe custody of the prisoner the sole and legitimate object of the Statute, and do not frightful consequences result from the Court’s resting the question of bail upon its own view of the real guilt or innocence of the acquitted person? The consequences of the whole of these practices of the Courts are these :

1. The general regularity of the administration of justice is disturbed, the Courts acting arbitrarily, with severity in one case, and with mildness in another.
2. The Courts thus render themselves promoters of second criminal trials, in contradiction to the maxims of the Common Law, in contradiction to the policy of the State, and without authority from the Statute which they affect to execute; and,
3. They become themselves the institutors of a *THIRD criminal trial*, because, by making the question of bail to depend upon their view of the merits of the charge against the accused, they pronounce, between the first verdict and the second verdict, a verdict of their own,

either of guilty or not guilty. If A, being acquitted on an indictment, moves to be admitted to bail, and the Court refuse bail on the ground of presumption of guilt, and then goes to trial on the Appeal, he carries with him the weight of their adverse decision; and, in the whole, he is tried *three* times. For instances of the arbitrary and oppressive conduct of the Courts, I refer to the cases of Norkotts and Okemans*, Count Coningsmark †, Bambridge and Corbet ‡, Pyle and

* “Sir John Maynard relates a case which occurred 4 Charles I, wherein Mary Norkott, John Okeman, and Agnes his wife, and Arthur Norcott, were tried for the murder of Jane Norkott, wife of the said Arthur, at the Hertford Assizes, and acquitted, but so much against the evidence, that Judge Harvey let fall his opinion, that it were better an Appeal should be brought, than so foul a murder escape unpunished. The Appeal was brought by the young child, against his father, grandmother, aunt, and her husband, Okeman. The Appeal was tried before Sir Nicholas Hyde, Chief Justice. Okeman was acquitted; but the other three found guilty. The grandmother and husband were executed, and the aunt respited, on account of her being with child.” *Hargrave’s State Trials, Vol. X, cap. 31.*

† “In the case of Count Coningsmark, who was tried for murder, 1681, and acquitted, the Court ordered a recognizance to be taken from the Count, with three sureties, to answer any Appeal, if brought.” *Hargrave’s State Trials, Vol. III, p. 501.*

‡ “Thomas Bambridge, Warden of the Fleet, was tried at the Old Bailey, May 22, 1729, for the murder of Robert Castell, a prisoner in the Rules of the Fleet. The charge was, that he had illegally removed him to a spunging-house, kept by one Richard Corbet, where he caught the small-pox and

Grant*, and Christopher Slaughterford. In that of Norkotts and Okemans, it is very possible

died—Bambridge knowing at the time, that a person sick of the small-pox was at Corbet's, and Castell declaring, that if he was carried there, and caught the infection, he should die. Bambridge was prosecuted on the Report of the Committee of the House of Commons, and acquitted. Upon this acquittal, Mary, the widow of Robert Castell, brought an Appeal against the said Thomas Bambridge and Richard Corbet (who had been a material witness in favour of Bambridge on his trial). In Hilary Term, 3 Geo. II, the Appeal was brought, “when it was moved, that the Appellees might be bailed; and, upon debate, the Court were of opinion to bail Bambridge, and not Corbet: and the reason they gave was, that Bambridge had been acquitted, which was a strong presumption of innocence; and the Judge before whom he was tried, had certified, that he was very well satisfied with the verdict; and they said, they would bail in all cases, after an acquittal: and that was the reason they denied bail in Slaughterford's case, because Holt, Chief Justice, had sent out the jury again, to consider whether they would stand to their verdict of acquittal, and when they insisted upon it, he himself *ordered* the Appeal.

“ But, as to Corbet, there was no foundation to bail, for they denied that it was of course to bail in an Appeal; so Bambridge was bailed by two persons who justified in £1000 each. Towards the latter end of the term, it was moved that the Appellees might be discharged, there being a discontinuance, for that no *venire* had been taken out—the Court then admitted Corbet to bail.

“ Both, being thus out upon bail, appeared on the several continuance-days, according to their recognizances, and the Appellant also appeared; and, in the beginning of this term, the Appellants moved for a rule on Mr. Turner, the officer who

that substantial justice was done, but at the expense of general principles, which are of more value than particular operations of right. The case of Count Coningsmark exhibits oppression, because it differs from ordinary practice. Those of Bambridge and Corbet, and Pyle and Grant, show the discretionary power which has been exercised upon the question. On the opposite side,

keeps the records at the Old Bailey, to attend the trial, with the record of Bambridge's acquittal; he not being allowed a copy of it. But the Court refused to make any rule, and said, if it was brought it could be no evidence.

"The trial of Thomas Bambridge and Richard Corbet, on an Appeal for the murder of Robert Castell, came on at Guildhall, January 26, 1729-30, before the Lord Chief Justice Raymond, and acquitted. 'Upon this acquittal, Mr. Kettleby moved the Court on the Statute of 13 Edw. I. c. 12, which enacts, That upon a false Appeal, by malice, the Appellor shall suffer a year's imprisonment, and restore the parties appealed their damages, at the discretion of the Justices. But the Court would not allow the same; the Chief Justice said, he was only to try the issue, and that the application was proper above, or by writ of conspiracy, and all he could do was to record the verdict.' Upon the 3d Feb. the Appellees were discharged." *Hargrave's State Trials*, IX, 182. *Strange's Reports*, II, 357.

* "Pyle v. Grant.—Hilary Term, 3 Geo. II. In an Appeal of Murder, it appeared the defendant was convicted on the indictment, but pardoned on the report of the Judge; and, after issue joined on the Appeal, he moved to be bailed, which was refused, the presumption being against him; contrary to Bambridge's trial. Appeal was not prosecuted in this case." *Strange's Reports*, II. 358.

the cases of Sayer and Salisbury*, and Smith and Bowen†, accord with the sound construction of the law. That of Smith and Bowen is particularly entitled to attention. It is one of refusal of bail, but in which bail was refused from the sole legal cause of insufficiency. The *safe custody* of a defendant, in order to his answering an Appeal, is all that should enter into the consideration of the Court; this is the proper subject

* “At the Kingston Assizes, in March, 1712-13, Richard Noble, gent. Mrs. Mary Sayer, and Mrs. Mary Salisbury, were tried for the murder of John Sayer, Esq. Noble was found guilty; Mary Sayer and Mary Salisbury acquitted. Counsel then moved, that Mrs. Salisbury and Mrs. Sayer might not be discharged, without giving sufficient bail, to appear, at any time within twelve months, to answer to any other indictment, or an Appeal. The Court ordered, they should give sufficient bail for their appearance, themselves in £1000 a piece, and their sureties in £500 each. Upon which they were discharged.” *Hargrave's State Trials*, IX, 7.

† “Bowen was tried at the Old Bailey for the murder of one Smith, found guilty, but obtained the Queen's pardon: the Appellant, an infant brother and heir to the deceased, lodges an Appeal, in *propria personâ*, against Bowen, the same Sessions, which was removed by *certiorari* into the King's Bench, 8 *Ann.* The Appeal was afterwards abated, and a new one, by Bill, instituted by the Appellant's guardian. The Appellee prayed to be admitted to bail, which the Court said they would do on issue joined, demurrer, or *Curia advisare vult*, if he could find four sufficient bail, who would be bound body for body; but those he offered not being approved of, he was remanded to the Marshalsea.” *Modern Reports, Easter Term, 1709*, p. 216.

for its “discretion;” and its decision on the question of bail should involve no opinion on the probable guilt or innocence of the prisoner or Appellee.

16. While I condemn, however, the general conduct of the Courts, on this question of bail in Appeals of Murder, (and which is immediately connected with their whole administration of the law relating to those Appeals), I will not neglect to offer what I conceive to be at least part of their apology. They have evidently, one and all, held the language which is recorded of Mr. Justice Harvey, (see Norkotts and Okemans,) and, presuming to exercise their “discretion” according to their private and personal opinions of the merits of the case, have approved of Appeals, where, without them, “a foul murder might escape unpunished*.” I must observe, in

* We are very apt to mistake the “foulness” of a crime for certainty of evidence against the individual accused of it; or, in proportion as we are impressed with its enormity, the less nice we become in distinguishing the offender. A story is told of an Irish Jury which pretty well illustrates the infirmity of universal man. An atrocious murder having taken place, an unfortunate individual was accused of being the murderer, and brought to trial. The Judge charged the Jury, that no evidence had been produced against the prisoner, and that therefore they must of necessity acquit him. To the surprize of the Court, however, the Jury returned a verdict of “Guilty.” The verdict being recorded, the Judge

passing, how much possible error there may lurk under the words, "lest a foul *murder* should escape unpunished." If a "foul *murderer*" were the expression, less danger might present itself; but neither the one sentiment nor the other is to be tolerated in the mouth of an English Judge. The intention of the Courts, in the mean time, has been most pure. The Courts have only erred in common with the multitude, and sought for particular justice at the expense of universal justice. They have only partaken with the multitude in the strong feeling and forgetfulness of reason which are induced by the recital of great crimes, and given way to that *wild love of justice** which is

requested to know upon what shadow of proof it had been brought. "My Lord," answered the foreman, "a great crime has been committed; somebody ought to suffer for it; and we do not see why this man should not, as well as any other;" or, perhaps, the reply was, "somebody must have done it, and we do not see why it should not be this man, &c." There is the more reason to fear the influence of such an argument, or rather sentiment, because, however much it violates *justice*, it is unquestionably consistent with *policy*; and, when men have got hold of the right, in whatever form, they are sometimes not very discerning in its due application. It is clear that it would be more to the advantage of society, that the innocent should suffer, than that a crime should not be followed by a punishment. The principle has even been largely acted upon, and with beneficial effect; but, in adopting it, what becomes of justice, and of the rights of individuals?

* Lord Bacon calls revenge "wild justice." There is also

so excusable, but so mischievous! But the Courts have acted from a conscientious persuasion of their duty; and the difference between them and us arises radically from our opposite views of the *intention* of the continuance of Appeals. They have thought them continued “in order to insure the infliction of punishment on offenders;” that is, they have gone, heart and hand, and in spite of reason and law, into the acceptance of the doctrine of second criminal trials. In consequence, they have used their discretionary power upon bail, in Appeals *after* trial on indictment, as they would rightfully use it in Appeals *before* such trial. Therefore, they have looked at the question of bail in Appeals *after*, as they do and ought to look at it in the ordinary cases of persons committed for trial for murder at the suit of the King, where, if no sufficient evidence appears to have been produced against the prisoner, they will admit him to bail. This practice, I repeat it, would be perfectly right, if the Appeal were the first proceeding*; but it is perfectly wrong where

a wild love of justice, an ungoverned passion, which is capable of the greatest injustice.

* “If any be appealed of Rape, he must be attached yf the Appeale be freshe, and they must see an apparent signe of truth, by effusion of bloode, or an open cry made, and such shall be by four or six pledges, yf they may be found. If the Appele were without cry, or without any manifest signe or token, two pledges shall be sufficient. Upon Appeale of Wounds, especially yf the woules be mortal, the partie ap-

its object is a second trial. There, they should obey only the letter (which is the spirit) of the Statute, by holding the Appellee (if not every person acquitted of murder) in *safe custody*, to answer the Appeal brought, or which may be brought. The sufficiency or insufficiency of the bail offered; the means of insuring that safe custody, amid the desired indulgence to the prisoner, is the sole point submitted by the law to their discretion. A contrary practice must deter a prudent Appellee from asking for admission to bail; for it prevents him from encountering the risk of a refusal without prejudice to the question of his innocence. Refused, he must (as intimated before) present himself to his second Jury with the judgment of "GUILTY" (pronounced by the Court above) printed in large letters on his forehead.

17. But the whole case of Christopher Slaughterford, above mentioned, is a practical commentary on *second criminal trials*. "Christopher Slaughterford paid his addresses to Jane Young,

pealed shall be taken immediately, and kept untill it be known perfytely whether he that is hurt shall recover or not. And yf he dye, the defendant shall be kepte. And yf he recover helthe, he shall be attached by four or six pledges after, as the wound is great or smal. If it be for a mainne, he shal find no less then four pledges; if it be for a small wounde or a mainne, two pledges shall suffice." 4 *an. Ed. I.*

and it was generally supposed he intended to marry her. The last time he was seen in her company was on the evening of the 5th of October, 1708, from which day she was not heard of for a considerable time; on which, suspicions arose that Slaughterford had murdered her. About a month afterwards, the body of the unfortunate girl was found, in a pond, with several marks of violence on it; and the public suspicion being still fixed on Slaughterford, he voluntarily surrendered himself to two Justices of the Peace, who directed that he should be discharged; but, as he was still accused by his neighbours, he went to a third magistrate, who, agreeably to his own solicitation, committed him to the Marshalsea prison, and he was tried at the assizes at Kingston, and acquitted. *The majority of his neighbours*, however, still insisted that he was guilty, and *prevailed* upon the relations of the deceased to bring an Appeal: towards the expense of which many persons subscribed, as the father of Jane Young was in indigent circumstances. At the next term, he was tried in the Court of King's Bench, the Appeal being lodged in the name of Henry Young, brother and heir to the deceased. The evidence given on this second trial, was in substance the same as on the first; yet so different were the sentiments of the two Juries, that Slaughterford was now found guilty, and received sentence of death. He was

hanged at Guildford on the 9th July, 1709*.”—
 But is the probability for or against the guilt of Slaughterford? It is sufficiently distressing, when criminals convicted upon the surest evidence, die protesting their innocence, though of that act of falsehood we are not to be surprised that vicious men can be guilty. But how much more deeply ought we to feel the force of such declarations, when supported by the verdict of one Jury against the verdict of another Jury? And with how much suspicion ought we not to view the unfavourable verdict of a second Jury, driven to condemnation by the clamours of their neighbours, sent into the box *expressly to reverse the decision of their predecessors*, conscious that they can no otherwise satisfy the public, prepossessed by the current rumours and arguments—certain that if they should find a verdict of Not Guilty, they will disappoint all expectations, and

* “ Christopher Slaughterford was tried at the Lent Assizes in 1709, at Kingston, in Surrey, for the murder of Jane Young, and acquitted, before Justice Holt: however he was ordered to remain in gaol, many persons thinking him guilty. The father and friends of the deceased being poor, a subscription was set on foot and money raised, and an Appeal was brought against the said Slaughterford, by Henry Young, brother of the deceased. He was tried at the Queen’s Bench Bar, at Westminster, on the second day of the term following, before the Lord Chief Justice Holt, found guilty, and executed.” *Hargrave’s State Trials*, IX, 542.

bring reproach upon themselves? Does this second Jury enter upon the trial with the same freedom of the mind as the first? Do they go to try whether the prisoner is guilty, or not rather *to find that he is guilty?*—The case of James Clough is a second in point. He “ was indicted for the murder of Mary Green, his fellow servant, at the Green Lattice, Holborn. He was tried in April 1729, and acquitted ; but, before the session was ended, an Appeal was brought against him, by William Green, the brother and heir at law of the deceased ; whereupon the prisoner was brought to the bar, and arraigned in the ancient French Law Latin, which was afterwards read to him in English. He desired till next sessions to plead. At the sessions in May 1729, William Green appeared, and moved the Court, that the trial should come on ; but in consequence of his not having brought a *venire facias* in time, it was deferred till next session. In July 1729, Clough was tried on the Appeal, the witnesses on the former trial were examined, and no new evidence adduced ; but he was found guilty, and executed July 25th. He protested his innocence to the last, and called on his master, on his way to Tyburn, and denied his guilt with great composure*.”

* Newgate Annals, Vol. II, 35. In the instance of Lewis Houssart, as in that of Norkotts and Okemans, it is possible

18. The *intention* of continuing the Writ of Appeal (we may now safely assume it) was no other than that of pacifying a rude population, habituated to avenge their own wrongs, and preventing the evils of family feuds and of individual bickerings and violence. It is *not to satisfy public justice; for that is*

that the real justice of the case was attained, though by exceptional means. New and important evidence was produced on the second trial; and, if true, the culprit, possibly, was guilty.

“ Lewis Houssart was tried for the murder of his wife, in March, 1724, and acquitted, but detained in custody on a charge of bigamy. In May 1724, an Appeal was lodged against him, by Solomon Rondeau, brother of the deceased. In October 1724, he was brought to a second trial. On the former trial, it had appeared, that Houssart had been separated from his wife, who was living with her mother; that on the night of the murder, a boy was sent to Ann Rondeau, the mother, to say, that a person wanted to see her, in Shoreditch; and, during the absence of the mother, the murder was committed. On the second trial, the boy was produced, who swore to Houssart's having sent him with the message to the mother, who also identified the boy. The Jury found the prisoner guilty, and he was executed, December 7, 1724.”—It is remarked, that in this case, the prisoner made some objections to the plea, which were referred to the Jury, who decided in favour of the Appellant on them all. One of the prisoner's objections was, that “ there were no such persons as John Doe and Richard Roe, who are mentioned as pledges in the Appeal;” but a witness deposed, that there were two such persons then living in Middlesex, one being a weaver, and the other a soldier.” *Newgate Annals, Vol. I, 215.*

already satisfied: the King, the common guardian of the public peace, has already prosecuted; "God and the country" have been called upon to hear the accusation, "and true deliverance make;" the accused has appeared at their bar; the King has been heard by his attorney; the King's witnesses have been heard also, and "God and the country" have pronounced a verdict of "Not Guilty." Public justice, then, is satisfied. The public, the King, shall not be permitted to harass the accused further; his life shall not be placed, a second time, at hazard; his personal liberty shall not, a second time, be interrupted; his reputation shall not, a second time, be impeached. But now comes the *private* suitor. He declares himself dissatisfied with the decision of "God and the country;" he comes, to *swear* that the man whom he accuses *is guilty*, and he demands leave to pursue afresh, him whom "God and the country," upon the hearing at the suit of the King, have acquitted. This demand, upon the plea of his heirship to the deceased, is complied with; but it is *no longer a public prosecution*; it is *no longer the King who prosecutes*; it is *no longer public ends that are in view*; but there is a *private prosecution*, and *private ends*; insomuch that, in the event of a verdict of guilty, the *prosecutor*, (not the King) may choose between taking the *life* or the *money* of

his victim; he bars the mercy of the *King*; he steps between the King (or the nation) and the accused; and no public objects, no motives for mercy, no doubts of guilt, no power of the King, the public or country, can interfere, to arrest the anger or the cupidity of the prosecutor, and prevent the celebration of this *private* sacrifice! All that is left to the country, to the King, is to sit by, in the persons of his Judges, to witness, and authorize, and regulate, this exercise of private power! Such is the effect of the Appeal of Murder; and who will say, that it is an effect permissible in the state of society in which we live, and consistent with the strength, and, therefore, the majesty, of the institutions which we have reared? Who will say, that the *intention* of its continuance ought to be persisted in, now that the *necessity* for that continuance has ceased?

21. It has now been shown, that the principle upon which the Appeal rests, is one at variance with all that is estimable in the laws of civil society, and in the nature of advanced civil institutions. It has been shown, that its operation is to place the subject, suspected of crime, in double risk, contrary to the established general maxim of our law. It is evident, that whatever may be its technical character, it must, when following a prior prosecution, take the nature of a *second* prose-

cution, and of an appeal for a *revision* of a former sentence. But it is plain, that if an accuser has this right of revision against an accused, common justice demands, that an accused should have the same right of revision against the accuser. In civil actions, where *new trials* are obtainable, this reciprocal claim to revision exists; and if *new trials* are admissible in criminal causes, the same *reciprocal claims* must be allowed, or the most atrocious oppression will be inflicted. But civil actions are perpetually renewable; the justice of the Courts of Law is continually called upon to grant new trials; and, thus, the same cause of action is capable of being kept before the Courts for a series of years, and through repeated trials. Are we aware of what we are about, when we talk of bringing a culprit before a *court of revision*, and of the dilemma in which we are instantly placed, whether we allow or refuse his equitable claim to be tried a *third* and a *fourth* time, as well as a *second*; or, when we adopt a notion of the administration of public justice, the practical effect of which would, or ought to be, to keep a criminal charge over a man's head till the day when he descends into the grave?

22. That too much has not been said, concerning the discordance of the Law of Appeal with the general principles of our criminal law, will be

conclusively demonstrated by the cases subjoined:—

1^o. “ Pasch. 35 Eliz. Wetherel brought an Appeal against Darly, of Murder. This defendant pleaded not guilty, and was found guilty of man-slaughter, and had his clergy, and afterwards was indicted for murder and arraigned at the Queen’s suit; and he pleaded his former conviction in the Appeal at the suit of the party: and it was adjudged a good bar, and thereupon he was discharged, for it was a bar at the Common Law, and restrained by no Statute; and the reason is, because the life of man shall not be put in jeopardy twice for the same offence.” *Coke’s Reports*, p. 258.

2^o. “ Cullingford was acquitted upon an indictment of murder, in the country, and an Appeal brought, and time given till the next assize, to plead. In the mean time the cause is moved by *certiorari* into the Court of King’s Bench, the parties become agreed—the Appellant grants a release: whereupon he moved to be discharged, but the Court decided, that there being a record against him, if the Appellant did not appear, he must be arraigned at the suit of the Queen, and then he may plead *auterfoits acquit*: for, there being a record against him, that record must be discharged.” *Modern Reports*, 13 *Anne*, p. 218.

3^o. “ In an Appeal of Murder, by Colt against Smith, for death of his brother, a conviction of man-slaughter and clergy allowed was pleaded in bar, and allowed to be good. And here, per Holt, the benefit of the clergy and burning in the hand is no judgment. And if a man be convicted of man-slaughter, and no judgment of death given, *auterfoits convict* will not be a good bar of an Appeal, but conviction and benefit of clergy is: And if one be convicted of man-slaughter upon

an Appeal, the King may pardon the burning in the hand, which shows it is no judgment, for then could not the King pardon it; and the Statute of Henry VII, has taken away the judgment of delivering over to the clergy, but orders a mark to be put on the party. *Hil. Term, 15 W. III, 1701.*" *Modern Reports*, vol. XII, 642.

We will take no notice, in this place, of the Appellant's "release," in the second of these cases; but only observe, in all the three, the irreconcilable principles of the proceedings on Indictment and Appeal respectively; those on the one side always leaning to mercy, the other breathing nothing but blood. And here, too, is the curious anomaly, that the Crown may pardon the burning in the hand, to an Appellee convicted of man-slaughter, though it is held that it cannot save the life of one convicted of murder. Is the reason that which is given by Chief Justice Holt, or is it because the burning in the hand is a punishment created by Statute, while death, upon a conviction of murder, follows by the Common Law? In either case, we see the general principles of our criminal jurisprudence struggling for operation, wherever the barbarity of the Law of Appeal can be successfully resisted or evaded.

23. Concerning the *private ends* which characterize the proceedings under a Writ of Appeal,

as distinguishable from those of *public justice*, we shall have occasion to speak again hereafter.

24. But let us now take an opposite view of our subject; let us suppose the Law of Appeal to be excellent; let us view with indifference the intention of its continuation by our ancestors, and let us rest satisfied if we have a reasonable intention of our own. Let us see, then, what is the state of this excellent law, as to its means of carrying our most reasonable intention into effect!

25. At the outset of our inquiry in this direction, we are met by almost endless limitations of the right of Appeal. It is not upon every murder, and against every murderer, that an Appeal can be brought. The particular merits of the case, the probable guilt or innocence of the accused (questions with which our Courts have so preposterously incumbered themselves) are nothing in the eye of the law. The venerable code under which we live enters into far more enlightened considerations! It inquires—not what are the probabilities of guilt—not what is the greater or less atrocity of the murder—but *what are the relations which the deceased has left behind him!* Nay, it is of indescribable importance to the success of the Appeal, to know what is the

condition, physical and moral, of the Appellor ! If the widow marries again, she cannot bring an Appeal ; if she marries while the Appeal is pending, the Appeal abates*. A husband has no Appeal for the murder of his wife ; a sister for that of her brother nor sister ; a daughter for her father nor mother† ; a mother for her son nor daughter ! Thus, had Thomson's " lovely young Lavinia " found an untimely death ; had Palemon, instead of being " the prince of swains," been a ravisher and murderer, no punishment, by Appeal, for want of an *heir male*, could have succeeded. Her " mother,"

" While (pierced with anxious thoughts) she pined away

" The lonely moments for Lavinia's fate,"

must have wept unheeded. Her " withered veins"

* " If a wife marries again before the Appeal is brought, or whilst the same is depending, her Appeal is gone." 2 *Inst.* 68. 317. This may happen, therefore, in the aggravated and not unheard-of case, of a wife's consenting to the murder of her husband, for the express purpose of marrying the murderer ! So, also, in an Appeal of Rape, if the woman marries her ravisher, her Appeal is lost. But here, according to Comyns, the woman's subsequent consent does not prevent an Appeal by certain of her male relations.

† " The husband shall not have an Appeal for the death of his wife ; but the heir only." *Danv. Abr.* 488.

" If a woman brings an Appeal of Death of her father, or of any other besides her husband, the Judges are bound, *ex officio*, to abate it, though the defendant takes no exception to it." 2 *Hawk. Pl. C.* 166, *cap.* 23, *s.* 42.

could have had no quickening from the “joy” of revenge. In a word, a *wife*, an innocent wife, and a *male* heir*, within the four nearest degrees of blood†, are the only persons (as we have seen) who can bring an Appeal. Nor is this all: we have seen that a daughter cannot appeal a murderer for the death of her father nor mother; but this is not enough; the very existence of a daughter of the deceased may bar the Appeal; for the heir, say the books, ought to be the immediate heir: so, if the deceased leave issue a daughter, his brother shall not have an Appeal‡.

* “Where an Appeal lies *against* an heir, the next heir shall bring it.” *Hawk. P. C.* 182.

† See a distinction still more nice, *Comyns*, i, 503. 2 *Inst.* 69.

‡ *Comyns*, (i, 503,) who cites *H. P. C.* 183, and *Co. Lit.* 256. 2 *Inst.* 68, tells us, that the heir shall have his Appeal, though he derives his blood by females; but *Pulton* has some exceptions to this rule: —“As a woman shall have no Appeale of the death of any other but of her husband, no more shall any cosin of him that was slaine, who maketh his conveyance in kiured by a woman, have any Appeale of the death of him that is killed; notwithstanding he be issue male, and not female; and notwithstanding that the woman by whom he maketh his conveyance died in the lifetime of him of whose death the Appeale is commenced. As, if a man have issue one only daughter, who marieth a husband, hath issue a sonne, and dieth, and, after, the father of that woman is slaine; in this case, the sonne of the woman shall not have an Appeale of the death of his saide grandfather, though he be his next heire at the Common Lawe, and inheritable to his land; because his mother was foreclosed of it by the foresaid Statute

So, again, (and for the same reason,) if the next heir die, before or after an Appeal commenced, the heir of that heir shall not have an Appeal*. So, if the deceased leave a wife, who dies within the year, before an Appeal commenced, the heir of the deceased shall not have an Appeal†; for the action was once attached to another. The blood of the heir must not be corrupted by attainder, nor the deceased be an attainted person‡. The wife must be lawfully married; for if the Appellee can discover a defect in the marriage or pretended marriage, he may bar the Appeal: “*ne unq. accouple* is a good plea.” If a wife marries again within the year, though her second husband dies within the year also, there is no Appeal. If she is eloped or divorced at the time of her husband’s murder, there can be no Appeal; for, in that case, she has no right of Appeal

of Magna Carta; and so, likewise, he which hath none other title thereunto, but that which he deriveth from his saide mother. But if he that was slaine have none heire on the father’s side, then the uncle or next of kin on the mother’s side shall have the Appeale; yea, though he do convey his title thereunto by a woman.” *Pulton*, p. 157.

* Comyns, i. 503.

† Except when the wife kills her husband. On the other hand, the wife may have an Appeal though she had eloped in his life-time, and though her husband was attainted; which last is a bar to the heir.

‡ See the preceding note.

herself, nor can the heir appeal*. But further, if there be no wife, and the immediate heir male be an idiot, or insane, or born deaf and dumb, or outlawed in a civil action, there can be no Appeal †. Such are some of the difficulties that stand in the way of executing our reasonable *intention* of bringing persons accused of murder to a second criminal trial—and yet the master-piece remains behind! If an accused person is prosecuted on an indictment for murder; if the fact, that the deceased came by his death by the hands of the accused, be beyond all dispute; but if (as happens every day) the circumstances leave such a shadow of a ground for doubt, as to whether, in a moral, or perhaps only a legal sense, the crime amounts to murder; if, in such a case, a Jury, almost reluctantly, shall incline to the merciful side, and bring in a verdict of man-slaughter, and the prisoner shall undergo the smallest allowable punishment—that prisoner is saved from prosecution by Appeal, and consequently from further peril of his life. But if an accused person, upon being brought to trial, shall

* “An heir shall not have an Appeal for the death of a man married, except the wife kill the husband; in which case the heir may prosecute the Appeal.” 1 *Leon.* 326. 1 *Inst.* 33.

† “An idiot, or a person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any Appeal whatsoever.” 2 *Hawk.* 168 *et seq.*

appear to his Jury to be wholly innocent ; if he shall appear to have caused the death of another only through misadventure; if he shall appear to have had nothing to do with that death, and to be quite wrongfully accused ; if error, or if the worst motives are shown to have led to his prosecution* ; and if, in these circumstances, he is, as of course he will be, entirely *acquitted*, and, as men would say, entirely cleared by his Jury—that man may be prosecuted again upon Appeal, condemned at the pleasure of a second Jury, and executed (as we shall see hereafter) in spite of the Court, the Crown, and the Country. Such is the law ; such is the law which has hitherto been preserved, (preserved, as we shall find, not through neglect nor forgetfulness but) with anxiety, with jealousy, with determined opposition to repeated attempts to abrogate it! Such, then, is the law—*absurd* it will be called by every tongue—and the folly of our ancestors will be taken for the cause. The wisdom of these enlightened times, and the ignorance and barbarism of the “old men, our fathers,” will be comfortably set down as the explanation—both of the condition of what we find, and of our skill in discerning its defects. But the flattering unction must be forborne. The ignorance and the barbarism is ours, and not our fathers’. We *intend* the Appeal to be a part of

* See the case of Bambridge and Corbet, above.

public justice ; the honest savages, our ancestors, had no *intention* of the kind ; they gave the wife and the heir a civil suit, for the relief of their private loss. In after times, when *public justice* inquired into crimes—when *example*, and not *revenge* nor *compensation*, became the principle of criminal punishments—when the arm of the law became strong enough to deal with the offenders—the Appeal lost all its utility—it was even pregnant with mischiefs. It was then that new generations began the work of restricting the right of Appeal. They took it away wherever they could ; and that is the reason why so little remains. Again, our Courts, to do them justice, though they have unhappily lent themselves to the principle, that Appeals are continued in order to insure punishment on offenders—have still construed the law with laudable strictness on some other points—and hence, from their good sense and equity itself, have sprung some of those features of folly and injustice to which we have pointed. The reason why a person acquitted, even in the worst circumstances of murder, and found guilty and punished for man-slaughter, cannot be prosecuted by Appeal, while a person perfectly innocent can be so prosecuted ; is substantial and unimpeachable, whatever is the anomaly it may occasion. A wife can appeal only under the restrictions that have been mentioned, because nothing was anciently intended by the

Appeal, but a compensation for her private loss, which she might take in vengeance upon the murderer of her husband, or in money or goods; and, this being so, if she married again, it was considered, that neither in her affections, nor in the want of a husband, had she any civil loss to compensate. So, the heir could prosecute only for his civil loss; and the law, as has been seen, refuses the right of Appeal even to the great majority of heirs. All females, except wives, were excluded—for a reason which it will be of much importance to this Argument to produce hereafter. Now, every restriction of this kind would have been equally absurd and unjust, if *public justice* had been the end in view; but there was no such end proposed; the Appeal was a civil suit; and further, the policy of the legislature was, gradually to abrogate the right of Appeal; and, for that purpose, every contrivance was made use of, to restrain it, from time to time, as much as possible. Again, the reason why a person convicted of, and punished for, man-slaughter, cannot be appealed, while one who is acquitted, may be appealed, tried again, and executed, is, that the Courts, in this respect, have pursued a course as near to justice and the Common Law, as the Statute of Henry VII has permitted them—as the Statute, in its turn, went as near to justice and the Common Law as the framers were able to make it.—With

this view of the partial and fantastic operation of the modern Law of Appeal before us, what ought to be our reflections? Criminal law has sometimes been called a cobweb, which stops little rogues, while great ones break through ; but what sort of a cobweb is that, the very nature and texture of which is systematically adapted to stop only one offender in every hundred, and let the remaining ninety-nine escape?

26. Thus far, however, we have considered only the obstacles which stand in the way of so many of the survivors of a murdered person, to prevent the bringing an Appeal, and to obstruct the accomplishment of what we are now supposing to be so reasonable an intention—that of procuring the second trial of one accused but acquitted ; and thus far it has appeared, that the Law of Appeal is at variance, by its inequality, with the general principles of our jurisprudence, which throw no similar difficulties in the way of prosecution by indictment. But, turning from the prosecutor to the prosecuted, we are again to behold the peculiarity of this mode of proceeding, inasmuch as, in what regards our present examination, it violates the principles of our laws, by bringing an accused person to trial without the intervention of a GRAND JURY. “ In the administration of justice in criminal cases,” (to use the words of an able Judge, now presiding in

one of His Majesty's Colonial Courts,) "our law has wisely provided for the *accusation* and *trial* of every culprit by his peers; and, with a view to his protection against the possibility of oppression, has rendered the indictment of a Grand Jury, and the verdict of a Petty Jury, alike indispensably necessary to his condemnation*." This is, indeed, the provision of our general law—but what says our Law of Appeal? Does any one, under that law, stand between the prosecutor and the prosecuted? No such thing. Observe the summary course of the proceedings. First—for we will forget, for the present, that there has been a previous trial and *acquittal*—first, the accused is seized and committed to prison—upon what? any evidence of guilt?—no, but at the request of the prosecutor, and upon the single condition, that the latter produces sureties for prosecuting the Appeal! The following is the form of the King's Writ:

FORM OF A WRIT OF APPEAL.

"GEORGE THE THIRD, by the Grace of God, &c. To the Sheriff of greeting. *If* of the parish of in the county of who was the and is the heir of late of in the parish of in your county, deceased,

* See a learned and practical Charge, delivered to the Grand Jury of the district of Quebec, at the late Summer Assizes, by the Hon. Chief Justice Sewell, *Colonial Journal*, Vol. IV.

shall give you security to prosecute his suit, then we command
 you that you attach late of
 in the parish of in your county,
 by his body, according to the law and custom of England, so
 that we may have him before us on the morrow of All Souls,
 wheresoever we shall then be in England, to answer to the
 aforesaid of the death of the aforesaid
 heretofore his and whose heir he is, whereof he ap-
 pealeth him ; and have you there this Writ. Witness ourself at
 Westminster, the day of in the year of
 our reign.

The Appellee, being thus placed in custody, is next compelled to plead, by the single virtue of the Appellee's Count of Appeal, or account of his appeal, call or summons :

FORM OF A COUNT OF APPEAL.

“ In the King's Bench, Michaelmas Term, 58 Geo. III.

was attached to answer
 who was the and is the heir of de-
 ceased, of the death of the said and thereupon
 the said in his own proper person instantly ap-
 pealeth &c. For that he the said
 not having the fear of God before his eyes, but being moved
 and seduced by the instigation of the Devil, on the day
 of in the year of the reign of our Sovereign
 Lord George the Third, by the Grace of God, &c. with force
 and arms, at the parish of in the county of
 in and upon the said in the peace of God and
 our said Lord the King then and there being, feloniously, wil-
 fully, and of his malice aforethought, did make an assault, and
 that the said then and there feloniously and wil-
 fully, and of his malice aforethought, did

and did then and there feloniously, wilfully, violently, and of his malice aforethought,

in the by means of which said
of the said by
the said in form aforesaid, the said
of the
said then and there died. And so the said
the said in manner and form
aforesaid, feloniously and wilfully, and of his malice afore-
thought, did kill and murder, against the peace of our said
Lord the King, his crown and dignity. And if the said
will deny the felony and murder aforesaid, as afore-
said charged upon him, then the said who was
the and is the heir of the said deceased,
is ready to prove the said felony and murder against him, the
said according as the Court here shall consider
thereof; and hath found pledges to prosecute his Appeal.

Witness,

So directly in the teeth of our ordinary maxims is such a proceeding as this; and so little, at times, have the historical explanations, which alone can assist us in appreciating it, been adverted to, that an eminent lawyer of a former age ventured to found on it a view of the purpose of our Grand Juries, in every respect as mischievous as it is erroneous. On the trial of Fitzharris, Count Coningsmark, Sir John Hawles went into the following argument :

“It is true, (observed the Learned Counsel) it is generally said, that the business of a Grand Jury, in capital matters, is *in favorem vite*; but that, taken simply, is not true: for, then,

what reason can be assigned, why a man shall be arraigned on an Appeal of Murder, Robbery, or the like, which touches his life, as much as an indictment of these crimes, without having the matter of the Appeal first found to be true by a Grand Jury; but the true reason of a Grand Jury is, the vast inequality of the plaintiff and defendant; and therefore the law has given this privilege to the defendant, on purpose, if it were possible, to make them equal in the prosecution and defence, that equal justice may be done between both. It considers that the judges, the witnesses, and the jury, are more likely to be influenced by the King than by the defendant; the judges, as having been made by him, and as it is in his power to prefer or reward them higher: and though there are no just causes for them to strain the law, yet there are such causes which, in all ages, have taken place, and probably always will. Nor was it, nor is it, possible, but that the great power of enriching, honouring, and rewarding, lodged in the King, always had, and yet must have, an influence on the witnesses and jury; and therefore it is, that the law has ordered, that at the King's prosecution, *no man shall be criminally questioned*—this is a criminal question—*no man shall be criminally questioned, unless a Grand Jury, upon their own knowledge, or upon the evidence given them, shall give a verdict, that they really believe the accusation is true* *.”

Sir John's difficulty, in explaining “why a man should be arraigned on an Appeal of Murder, &c. without having the matter of the Appeal first found to be true by a Grand Jury,” as on an indictment, is one which well deserves to arrest regard; but his solution, that “the reason of a Grand Jury is the vast inequality of the plaintiff

* Trial of Count Coningsmark, State Trials. vol. iv, p. 46.

and defendant," which plaintiff and defendant he afterwards considers exclusively as King and Subject, is entirely defective. The "business of a Grand Jury" is truly, what Sir John thinks himself obliged to call into question—*in favorem vitæ* ; and the only reason why a man is arraigned upon an Appeal without the finding of a Grand Jury, and not so upon an indictment, is, that the two processes are entirely different—and that Appeals existed before Grand Juries, but Grand Juries before indictments. How totally different the two processes are, we must presently consider more at large. In the mean time, the hardship which is thus laid upon the accused, in being, in any case, sent, under a Writ of Appeal, to a Petit Jury, without "having the matter first found to be true by a Grand Jury," must not escape the reader's observation, nor be omitted in his survey of the means of carrying into effect, under the Law of Appeal, the notable intention of bringing an accused person to a second criminal trial!

25. The reader will also observe, that the accused is committed to prison without even the intervention of a magistrate—no examination—no depositions—no hesitation on the grounds of committal—no protection—no responsibility;—the prosecutor's request, the King's Writ, and the sureties for prosecuting the Appeal, are all that are necessary for depriving a subject of his

liberty, and for putting an acquitted person into second jeopardy of his life!

26. Magna Carta is commonly supposed to assure to every subject a trial by his Peers; and Peers of the Realm, if prosecuted for murder or other felony, at the suit of the King, are tried by their Co-Peers of the Realm: but if proceeded against by Appeal, after acquittal by their Peers, they must be tried by a Petit Jury of ordinary freeholders, without the intervention of a Magistrate, or of a Grand Jury, &c. &c.*

* “ If a Peer of the Realm be arraigned at the suit of the King, upon an indictment of murder, he shall be tried by his Peers, that is, nobles; but if he be appealed of murder by a subject, his triall shall be an ordinary Jury of twelve freeholders, as appears, 10 Ed. IV, 6; 33 Hen. VIII.” *Philological Commentary*, p. 159.

“ In an indictment of treason, or felonie, against one of the Peeres of the Realme, the triall is by his Peeres; which manner of triall, in an Appeale, is not allowable.” *Pulton*, p. 196.

“ If an Appeale of Murder, or other felony, be sued by any common person against a Peere of the Realme, he shall be tried by common persons, and not by his Peeres. 10 Ed. IV, 6.” *Pulton*, p. 127.

“ At the Revolution, on the 14th of January, 1689, the House of Peers resolved, ‘ That it is the antient right of the Peers of England to be tried only in full Parliament for any capital offences;’ but three days afterwards, viz. on the 17th of January, they entered the following declaration: ‘ It is declared by the Lords spiritual and temporal, in Parliament assembled, that the order made the 14th day of this instant January,

27. If we now pass from the accusation of an Appellee, to the further and ultimate proceedings

concerning the trials of Peers in Parliament, shall not be understood or construed to extend to any Appeal of Murder, or other felony, to be brought against any Peer or Peers ; and it is ordered that this declaration be entered on the vote of standing orders of this House." *Horne's Trial for a Libel, A. D. 1777. State Trials*, vol. xi.

The foundation of the trial of the Peers of the Realm on Appeals, by common juries, is doubtlessly to be discovered, like the other peculiarities of the Law of Appeal, in the prior existence of that law, as compared with our other institutions. It existed before Peers of the Realm and their privileges ; and our statutes go, not to *create*, but only to *save*, the right of Appellants. The statute of 10 Edw. IV seems to be lost ; it is to be found neither in Rastall's nor Berthelot's Statutes, nor in the recent publication, entitled "Statutes of the Realm." The thirty-third of Henry VIII only directs that Peers of the Realm shall be tried "as heretofore ;" but in the fifteenth of Edward III, it is said, "Whereas, before this time, the Peers of the Land have been arrested and imprisoned, and their temporalities, lands and tenements, goods and cattels, asseized in the King's hands, and some put to death, without judgment of their Peers: It is accorded and assented, that no Peer of the Land, officer nor other, because of his office, nor of things touching his office, nor by other cause, shall be brought in judgment, to lose his temporalities, lands, tenements, goods and cattels, nor to be judged, but by award of the said Peers, in the Parliament. Saving always to our Sovereign Lord the King and his heirs, in other cases, the laws rightfully used, and by due process ; and saved also the suit of the party." *Statutes of the Realm*, 15 Ed. III, cap. 2.

"The words *per legale judicium parium suorum*, imme-

against him, the disgusting features of the law by which the whole is regulated will present themselves with increased deformity. Upon a conviction in an Appeal of Murder, the Appellee is to be hanged*. The Crown has no power of pardon, which can either protect the accused against the Appeal, or release him from the consequences of a conviction; but the Subject may *release*, either before or after conviction†. Execution is not to follow, unless prayed by the pro-

diately preceding the other of *per legem terræ*, are meant of trials at the King's suit, and not at the prosecution of the subject; and therefore, if a Peer of the Realm be arraigned, at the suit of the King, upon an indictment of murder, he shall be tried by his Peers, that is, nobles: but if he be appealed of murder by a subject, his trial shall be by an ordinary jury of twelve freeholders, as appeareth in 10 Edw. IV, 6. 33 Hen. VIII; and, in 10 Edw. IV, 6, it is said, such is the meaning of Magna Carta: for the same reason, therefore, as *per judicium parium suorum* extends to the King's suit, so shall these words: *per legem terræ*." Mr. Lyttleton's Speech in the House of Commons, A. D. 1628. *Hargrave*, i, p. 152.

* The judgment in an Appeal of Murder shall be *quod suspendatur*, &c. *Comyns*, i. 515. G. 15.

† "Nor can the King pardon, where private justice is principally concerned in the prosecution of offenders. '*Non potest Rex gratiam facere cum injuria et damno aliorum.*' Inst. 236. Therefore in Appeals of all kinds, (which are the suit, not of the King, but of the party injured) the prosecutor may *release*, but the King cannot *pardon*." Blackstone, iv, 31.

"A release of all manner of actions is a good plea; so of all actions criminal or mortal." *Comyns*, i, 513.

secutor, in person; and, by the ancient law, the prosecutor, and all the family of the deceased, were to draw the felon to the place at which he was to suffer *. “It was a custom, in old time,

* “Appeal, *by a feme grossly enseint*, of the death of her husband, and the *defendant was attainted* at the suit of the feme, and the *appearance of the feme recorded for all the term*; and yet, by the best opinion, she *cannot pray the judgment and execution by her counsel*, but in proper person, by which *one of the Judges rid to her, to Islington, to see whether she was alive, and if she would pray execution*, and she prayed it, by which judgment was given that he should be hanged; for this action shall be sued in proper person, and likewise judgment shall be demanded in proper person; and after the judgment the execution cannot be prayed by attorney, but in person; and appeal of Mayhem shall be in person, and to see that *all appeals* shall be in person, and *not by attorney*. Brook’s Abridgment, B. 2, Appeal pl. 112, cites 21 E. 4. 72, 73. Viner’s Abr. tit. Appeal, vol. iii. page 581.

“Where a woman has judgment in Appeal of the death of her husband, she cannot have execution if she do not personally pray it; a Judge went to a woman great with child, to know if she would have execution? She said, “Yes;” and the Appellee was hanged. *Jenk. Cent.* 137.

But is not this altered by 3 Henry VII, (see above, page 20) one of the express objects of which statute was, to relieve Appellors, where practicable, from the necessity of suing in proper person; and which provides, that after one appearance of the Appellor, all the remaining parts of the proceedings may be conducted by Attorney?

“If a woman marries after the judgment, she cannot pray execution.” 2 *Hawk. P. C.* 104.

The case of the Kennedies, (1770) who purchased their

if one were found guilty in any Appeal of Murder, that his wife, and all the nearest of his kin which was murdered, should draw the felon who committed the murder, by a long rope, to the place of execution *."

28. Thus, the Law of Appeal takes from every subject in the kingdom,

1°. His protection against a second criminal trial, and therefore in the Verdict of a Jury;

2°. His protection in Magistrates and Grand Juries; and

3°. His protection in the mercy and in the jus-

release *before* pleading to the Appeal, is thus related: "The Kennedies were tried for the murder of a watchman on Westminster bridge, at the Old Bailey Sessions, in March 1770, and found guilty. Sentence of death was passed on them, but they were respited, and afterwards pardoned, on condition of transporting themselves for life. At the sessions in May, Anne Bigley, the widow, lodged an Appeal against them. Patrick was at that time in Newgate, and Matthew on board a vessel, to be transported; but both were brought up the following session, and committed to the King's Bench Prison. In November, they were brought to the bar of the Court of King's Bench, in order to plead to the Appeal; but the widow, having accepted a compensation (350*l.*) did not appear, and suffered a nonsuit." *Gent. Mag.* 1770.

* Pulton, *De Pace Regis et Regni*.

tice of the Crown. Further, from every Peer of the Realm, it takes,

4°. His protection in Trial by his Peers.

But the *second criminal trial* is merely a *modern innovation*; it makes no part of the ancient Law of Appeal*. The same is not to be said of the exclusion of Grand Juries, the royal pardon, &c. These are essential to the law; they belonged, with propriety, to the age which gave birth to the law; and, with respect to them, the only question to be argued is, whether it is fitting that they should be continued? It has been seen that they originate with the institutions of the earliest stages of society, and belong, in England, to a

* “ If one be arraigned upon an indictment at the King’s suit, and acquitted, (where, *by the order of the law, the King ought to have tarried until the Appeale which was depending had been determined*) yet this is no error; but the foresayd plea, viz. another time acquit of the same felonie, shall serve him that doth plead it. 16 Ed. IV, 11; 3 H. V, 6.” *Pulton*, p. 176.

“ If there be an Indictment and Appeal, depending at the same time against the same person, the Appeal shall be tried first, if the Appellant be ready, (Kel. 107.) otherwise, the King would destroy the suit of the party: for this reason, the King by his pardon cannot bar an Appeal.” *Jenk.* 160, pl. 4.

How much the law has sometimes been misrepresented, even upon grave authority, appears from the following:—“ Where a

time when the administration of *public justice* was not in its present form*.

person is acquitted on a just Appeal, he may be arraigned upon indictment at the King's suit." *Wood*, 629.

So, also, in this version of the Statute of Henry VII:—

“Where a person is indicted for murder, and acquitted thereupon, he is to be bailed till the year and day is past, allowed for bringing the Appeal, *if an Appeal be intended.*”—See the words of the Statute, above, (page 17.)

A writer in one of the public papers remarks, that in the case of *Egerton v. Morgan*, 1612, reported by Lord Chief Justice Dyer, “it would seem from the expressions of Dyer, that the Appeal was not *after* an acquittal on indictment.”

* In Robertson's History of Charles V, I find the same delineations, and sometimes the same expressions, with those which have occurred in the early part of these pages, on the subject of the primitive state of society in Europe, and the progressive advance of the administration of justice. Robertson has also instituted a comparison between the state of laws and government among the American Indians, and that which history ascribes to the ancient Germans, in which he expresses himself conformably to the tenor of my former note. Speaking of the progress of modern Europe in the art of government, that eminent writer says, “The various expedients which were employed in order to introduce a more regular, equal, and vigorous administration of justice, contributed greatly towards the improvement of society. What was the particular mode of dispensing justice in the several barbarous nations which overran the Roman empire, and took possession of its different provinces, cannot now be determined with certainty. We may conclude from the form of government established among them, as well as from their ideas concerning the nature of society, that the authority of the magistrate was extremely limited, and the independence of individuals pro-

29. But while so many odious peculiarities of the Law of Appeal seem to escape observation,

portionably great. History and records, so far as they reach back, justify this conclusion, and represent the ideas and exercise of justice in all the countries of Europe as little different from those which must take place in a state of nature. To maintain the order and tranquillity of society, by the regular execution of known laws; to inflict vengeance on crimes destructive of the peace and safety of individuals, by a prosecution carried on in the name, and by the authority of the community; to consider the punishment of criminals as a public example to deter others from violating the laws; were objects of government little understood in theory, and still less regarded in practice. The magistrate could scarce be said to hold the sword of justice; it was left in the hands of private persons. Resentment was almost the sole motive for prosecuting crimes; and to gratify that passion was the end and rule in punishing them. He who suffered the wrong, was the only person who had a right to pursue the aggressor, and to exact or to remit the punishment. From a system of judicial procedure, so crude and defective as seems to be scarce compatible with the subsistence of civil society, disorder and anarchy flowed. To provide remedies for these evils, so as to give a more regular course to justice, was, during several centuries, one great object of political wisdom. The first considerable step towards establishing an equal administration of justice, was the abolishment of the right which individuals claimed of waging war with each other, in their own name, and in their own authority. To repel injuries, and to revenge wrongs, is no less natural to man, than to cultivate friendship; and while society remains in its most simple state, the former is considered as a personal right, no less unalienable than the latter. Nor do men in this situation deem that they have a title to redress, their own wrongs alone; they are touched with

or to be seen without displeasure, one, hitherto omitted in our account, fills every mind with consternation and dismay! The accused has his choice, to be tried either by Jury or by Battle; and this choice is said to be incompatible with the civilization of the age. The Trial by Battle is called *impious* and *barbarous*, and some attempts are made to persuade us that it is *illegal*. At the best, it is held to be so offensive, (and the project of a second criminal trial so wise and equitable!) that good men think themselves entitled to be struck with horror at the proposal, and to use all and every means to *oust the Appellee* of his right. The design of this Argument, on the other hand, is, to show—not that Trial by Battle has any claim to perpetuation—but that, considered as a part of the Law of Appeal,

the injuries of those with whom they are connected, or in whose honour they are interested; and are no less prompt to avenge them. The savage, however imperfectly he may comprehend the principles of political union, feels warmly the sentiments of social affection, and the obligations arising from the ties of blood. On the appearance of an injury or affront offered to his family or tribe, he kindles into rage, and pursues the authors of it with the keenest resentment. He considers it as cowardly to expect redress from any arm but his own, and as infamous to give up to another the right of determining what reparation he should accept, or with what vengeance he should rest satisfied." *Progress of Society in Europe*, § i, 5. *Hist. Charles V*, vol. I.

it is entitled to more favourable consideration than may, at a cursory glance, be imagined.

30. In the first place, from the view that will presently be submitted, of the real principle of the Trial by Battle, the reader will probably be led to infer, that an Appellor, so far from having cause to express any surprize, when an Appellee wages Battle, is himself, by the words which the law puts into his mouth, the first party in the suit to propose that mode of deciding the issue; or, in familiar phrase, the first person who *offers to fight*.—It will be remembered, that in the Count of Appeal, the Appellor, after reciting the terms of his accusation against the Appellee, proceeds, “And if the said N. N. *will deny* the felony and murder, the said N. N. *is ready to prove* the said felony and murder against him, the said N. N. *according as the Court here shall consider thereof*.” The reasons will presently appear, for interpreting these words, if not as a challenge to fight, at least as an intimation of *a readiness to accept such a challenge*.

31. The Trial by Battle is called *impious*; thereby meaning, (for it ought to mean no more) that it implies a misplaced reliance on the Providence of God. It is coupled with the Trial by Ordeal, and described as an appeal to the Judg-

ment of God. All this only demonstrates the prevailing ignorance on the subject. The Judgment of God was one thing; the Trial by Battle, or Judicial Combat, was precisely another!—I know that I have all modern writers (even those in the greatest estimation) against me, upon this proposition; but I believe that I may confidently challenge an examination of every ancient book; and the stale repetition of the error is but one example of the evil consequences of satisfying ourselves with reading compilations and commentaries, instead of referring to original writings. The Judgment of God (*judicium dei*) was the Trial by Ordeal*, and that trial only. Ordeal was of two sorts, either *fire* ordeal, or *water* ordeal†. In these trials, a miracle, a departure from the ordinary course of nature, an immediate interposition of divine providence, was really ex-

* Otherwise called *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party.

† Fire ordeal was for free persons, and water ordeal for villains. “Tenetur se purgare is qui accusatur per DEI JUDICIUM; *scilicet*, per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.” Glanv. l. 14. c. 1. Both ordeals, says Blackstone, might be undergone by deputy; but the principal was answerable for the success of the trial: the deputy only venturing some corporal pain for hire, or perhaps for friendship. “This,” adds the Commentator, “is still expressed in that common form of speech, ‘of going through fire and water to serve another.’”

pected ; and here was really an Appeal to the Judgment of God. The Judiciary Combat had no such principle ; though Robertson has remarkably overlooked the difference, in the narrative which he gives of the decision, in Spain, on the Musarabic liturgy and ritual. It is plain, that in that example, the question was first left to the issue of Judiciary Combat ; and secondly carried, as it were by Appeal, and for revision, to Trial by Ordeal, or the Judgment of God*.

* “ A question was agitated in Spain, in the eleventh century, whether the Musarabic liturgy and ritual, which had been used in the churches of Spain, or that approved of by the See of Rome, which differed in many particulars from the other, contained the form of worship most acceptable to the Deity. The Spaniards contended zealously for the ritual of their ancestors. The Popes urged them to receive that to which they had given their infallible sanction. A violent contest arose. The nobles proposed to decide the controversy by the sword. The king approved of this method of decision. Two knights, in complete armour, entered the lists. John Ruys de Matanea, the champion of the Musarabic liturgy, was victorious. But the Queen and Archbishop of Toledo, who favoured the other form, insisted on having the matter submitted to another trial, and had interest enough to prevail in a request, *inconsistent with the laws of combat, which being considered as an appeal to God, the decision ought to have been acquiesced in as final.* A great fire was kindled. A copy of each liturgy was thrown into the flames. It was agreed that the book which stood this proof, and remained untouched, should be received in all the churches of Spain. The Musarabic liturgy triumphed likewise upon this trial ; and if we may believe Roderigo de Toledo, remained unhurt by the fire, when the other was reduced to ashes. The Queen and

32. That a religious character was given to the Judiciary Combat, at a time when religion and the influence of the Church entered into every transaction of human life, is to be readily granted*; and whatever *impiety* there may or may not be in the doctrine of *a particular providence*, or in the belief that the government of God, in the affairs

Archbishop had power or art to elude this decision also; and the use of the Musarabic liturgy was permitted only in certain churches. A determination no less extraordinary than the whole transaction." Hist. Charles V, vol. 1, note xxii. The commentary, here printed in italics, whether originally from Roderigo de Toledo, or from Robertson, is erroneous. The Queen and Archbishop appealed *from* the Judiciary Combat, *to* the Judgment of God.

* I am strongly suspicious, that, as was natural to happen, the consequences of the Norman invasion of England are usually painted in darker colours than they deserve. Perhaps our Saxon manners and institutions were not so much superior to the Norman as is commonly represented. Be this, however, as it may, the same Normans who brought us Appeal and Battle, brought us also the over-ruling influence of the priesthood, as is thus described, in severe terms, by Blackstone: "The consciences of men were enslaved by sordid ecclesiasties, devoted to a foreign power, and unconnected with the civil state under which they lived, who now imported from Rome, for the first time, the whole farrago of superstitious novelties, which had been engendered by the blindness and superstition of the times, between the first mission of Augustine the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy, and dogmatical infallibility of the Roman Sec." *Blackstone*, iv, 33. 5.

of this world, is conformable to human views of justice*, the clergy of the age to which we are now referring are to be applauded, and not stigmatized, for their efforts to reduce their savage contemporaries beneath the yoke of religion and morals. The clergy found the Law of Appeal; they did not make it; and they did the best that circumstances permitted—an apology which, on no occasion, will be slighted by rational inquirers. The Law of Appeal was attended (as, in a small degree, we have seen) by the most frightful evils. The great difficulty then, was not, as now, to get Appellors to fight, but to prevent ferocious and malignant Appellors from putting innocent men to the necessity of accepting *their challenges*, on unfounded charges of crime. Courage was then every one's virtue, and fighting an every-day amusement: the clergy endeavoured to repress the consequent evils; and they taught—what, if it was *impious*, was at least humane and useful,—that not brutal force, but moral rectitude, would have the better, in the appeal to arms. They endeavoured to implant—in minds that knew no other

* That the *letter* of the Gospel, at the least, countenances the doctrine of particular providence is certain; since it tells us that God “suffers not even a sparrow to fall to the ground without his knowledge.” We know, in the mean time, that pious men may believe in a particular providence, and yet not believe that it is employed, in this world, either to protect innocence, or to reward virtue.

fear—the FEAR OF GOD*. The truth is, that Trial by Battle was established in Pagan Eu-

* By how many contrivances it was attempted to soften or humanize the process of Appeal, it would be a very agreeable part of a complete treatise on the subject to display ; and the result would be highly creditable to the character of the *barbarous ages*. We have seen, in a former note, (page 36) the case of an Appeal of Murder brought by “a young child, against his father, grandmother, aunt and her husband.” Now, an Appeal (as will presently appear) was anciently made or enforced only by *Wager*, or giving gage, *of Battle* ; and what say the Assises de Jerusalem, upon the receipt of Gage of Battle, in other words, of allowing *an Appeal, or Wager of Battle*, by a son against his father, a father against his son, or brother against brother ? Why, that it cannot be ! “ Il est assisé au royaume de Jerusalem, que le Seigneur ne doit recevoir les gages de pere à fis, ne de fis à pere, ne de deus fraïres, l'un contre l'autre.” *Assises*, ch. cx. But, reverting to the *fear* which is to be impressed on the combatants in a Judiciary Duel, let us listen to the Commentator on the Customs of Normandy. The combatants, preparatorily to Battle, are to approach each other, to kneel together, to take each other by the hand, to be questioned as to their belief in the Father, the Son, and the Holy Ghost, and solemnly, by oath, to make charge on the one side, and denial on the other. Now, according to M. d'Alençon, “ it should be known, that the reason why they fall on their knees, is in sign of humility and devotion ; and so, also, each takes the other by the hand, to denote the good faith which ought to be between human creatures, where there is brotherhood, and also to have immediate consciousness and dread of his adversary, whose hand he holds ; which impressions of the mind put a check upon falsehood and audacity, and produce a feeling under which men are more fearful of perjurying

rope ; and that to Christian priests it owes the *impiety* (if we are to give it that name) of being

themselves." "On doit sçavoir que la cause pourquoi ils se mettent à genoux est en signe de humilité et de devotion. Et aussi s'entretiennent par les mains, pour denoter la féauté que doit estre entre humaine créature ou il y a fraternité, et aussi pour avoir memoire et doubte de son adversaire que on tient ; lesquelles chose sont cause de refrener de soy punir, et d'orgueil, par doubte de paour : euquel estat ou doit estre plus craintif de soy punir." *Grand Coustumier*. A further example may also be given. It appears, that according to the law of Normandy, (for we find no such usage at Jerusalem) *both* Appellor and Appellee, after giving their gages or pledges of Battle, are to be committed to prison, but may be *both* admitted to bail, *if they please*, provided they produce good sureties. The text of the *Grand Coustumier*, after describing the giving of the gages, adds, "Non pourtant ils doivent tous deux estre tenus en la prison du Duc ; et ce que droiet sera à faire Battaille leur doit estre ottroyé par la justice. Et si peut bailler l'un et l'autre en vue prison si leur plaist, pourtant que l'en les baille féablement, à bons garens." "Et les causes," says M. d'Alençon, sont, pour eschever les despens qu'on feroit en prison, aussi à fin que le corps de ceulx qui ont gaigé Battaille soient à leur aise, et que ils n'empirent ne affoibleissent par raison de la prison, et aussi pour pouveoir à leurs necessités qui leur sont requises et profitables." That is, they may be admitted to bail, "in order to save them the expenses which are incurred in prison, and also to the end, that the bodies of men, who have pledged themselves to Battle, may be at their ease, and that they may not be injured nor weakened by imprisonment, and also that they may provide themselves with such things as are needful and beneficial." Such is the ancient law ; but, here, as every where else, in this inquiry, we are unable to advance a step, without convicting our modern practice of

regarded by Christians as dependant upon heaven for its issues. Paganism, indeed, may have viewed it with sentiments of equal *impiety*; but still, in its origin, it was purely secular or human.

33. Poetry, too, which eagerly avails itself of religious impressions, and even of popular superstitions, because they belong to the heart and to the imagination, with which springs of action it is its peculiar privilege and function to be conversant—poetry, too, has contributed to array the Judicial Combat with a religious character, by sedulously preserving every trace of public opinion of that nature. That “God will stand by the right,” and that victory will wait upon truth, are notions inseparable from the *first* ideas of those that believe God to be the director of all things, and those ideas have consequently been always entertained. It is thus, to take a casual

some grievous departure from its type. In the rule, that both the Appellor and Appellee shall be committed to prison, or held to bail upon good sureties, *after* giving their gages, we see the origin of that part of the Writ of Appeal (page 62) which requires pledges to prosecute, *before*, and as the only condition of, attaching the Appellee. But our mongrel and disgraceful system is, to attach the Appellee without previous information; to reverse the order of taking pledges from the Appellor; and then to leave the Appellor at large, while the Appellee is imprisoned!

example, that *Cœur de Lion*, in the romance, when he is to fight the Saracens at Jaffa, exclaims,

“ Thorwgh grace of God in Trinitè,
Thys day men schal the sothe i-see*!”

The sentiment is a favourite one with Shakspeare, who says,

“ Thrice is he armed that hath his quarrel just,
And he but naked, though locked up in steel,
Whose conscience with injustice is corrupted †.”

And again, the expression, “ I am armed so strong in honesty‡.” And immediately to the point is the speech given to Henry VI, on occasion of a Trial by Battle, between a certain Armourer and his Apprentice, on an Appeal of Treason :

“ Go, take hence that traitor from our sight ;
For by his death we do perceive his guilt,
And God in justice hath revealed to us
The truth and innocence of this poor fellow,
Whom he had thought to murder wrongfully.”

Now, if, turning from the poet, we go to the historians, for the account of this combat, (for the scene is founded upon an actual occurrence) we shall soon find that all this gloss of religion disappears, and that the unfortunate Armourer was defeated, as to human perception, not as an act of divine revelation, but through the ill-judged kind-

* Weber's Metrical Romances.

† Richard III.

‡ Julius Cæsar.

ness of his friends, who plied him with Malmsey and French brandy. "This yere," (anno 1445, twenty-fifth of Henry VI) says Grafton, "an Armorers seruaunt, of London, appeled his master of treason, which offered to be tried by Battaile. At the day assigned, the frends of the master brought to him malmesye and *aqua-vite*, to comforte him with all, but it was the cause of his and their discomfort: for he poured in so much, that when he came into the place, in Smithfelde, where he should fight, both his witte and strength fayled him: and so, hee, being a tall and hardie personage, ouerladed with hote drinkes, was vanquished of his seruaunt, being but a cowarde and a wretch, whose body was drawn to Tiborne, and there hanged and beheaded*."

* Grafton's Chronicle, p. 594. That the Battle, indeed, was more of a drunken bout, than a religious appeal, is not wholly forgotten by the poet, as appears on an entire perusal of the scene:—

HENRY VI. PART II. Act II. Sc. 3.

Enter King, Queen, York, and Salisbury.

SCENE.—*A House near Smithfield.*

York. ————— Please it your Majesty,
This is the day appointed for the Combat;
And ready are th' Appellant and Defendant,
The Armourer and his Man, to enter the lists,
So please your Highness to behold the fight.

34. Robertson, whose erroneous conceptions of the Judicial Combat, copied from Montes-

Q. Mar. Ay, good my Lord; for purposely therefore
Left I the court, to see this quarrel try'd.

K. Henry. A God's name, see the lists and all things fit;
Here let them end it, and God guard the right!

York. I never saw a fellow worse bested,
Or more afraid to fight, than is th' Appellant,
The servant of the Armourer, my Lords.

Enter at one door the Armourer and his neighbours, drinking to him so much, that he is drunk; and he enters with a drum before him; and his staff with a sand-bag fastened to it; and at the other door his Man, with a drum and sand-bag, and 'Prentices drinking to him.*

1 Neigh. Here, neighbour Horner, I drink to you in a cup of sack: and fear not, neighbour, you shall do well enough.

2 Neigh. And here, neighbour, here's a cup of charneco.

3 Neigh. And here's a pot of good double beer, neighbour; drink, and fear not your man.

Arm. Let it come, i' faith, and I'll pledge you all; and a fig for Peter.

1 'Pren. Here, Peter, I drink to thee; and be not afraid.

2 'Pren. Be merry, Peter, and fear not thy master; fight for the credit of the 'prentices.

Peter. I thank you all; drink, and pray for me, I pray you; for, I think I have taken my last draught in this world. Here, Robin, if I die, I give thee my apron; and, Will, thou shalt have my hammer; and here, Tom, take all the money that I

* *With a sand-bag fastened to it.*—As, according to the old laws of duels, Knights were to fight with the lance and sword; so those of inferior rank fought with an ebony staff or battoon, to the further end of which was fixed a bag, crammed hard with sand. To this custom Hudibras has alluded, in these humorous lines:

“ Engag'd with money bags, as bold

“ As men with sand-bags did of old.”

quieu, disfigure all his reasonings upon the subject, has yet collected several facts which serve

have. O Lord bless me, I pray God; for I am never able to deal with my master, he hath learned so much fence already.

Sal. Come, come, leave your drinking, and fall to blows. Sirrah, what's thy name?

Peter. Peter, forsooth.

Sal. Peter? what more?

Peter. Thump.

Sal. Thump! Then see thou thump thy master well.

Arm. Masters, I have come hither as it were upon my man's instigation, to prove him a knave, and myself an honest man; and touching the Duke of York, I will take my death I never meant him any ill, nor the King, nor the Queen; and therefore, Peter, have at thee with a downright blow.

York. Dispatch: this knave's tongue begins to double. Sound, trumpets, alarum to the combatants.

[They fight, and Peter strikes him down.]

Arm. Hold, Peter, hold; I confess, I confess treason. *[Dies.]*

York. Take away his weapon; fellow, thank God, and the good wine in thy master's way.

Peter. O God, have I overcome mine enemy in this presence? O Peter, thou hast prevail'd in right.

K. Henry. Go, take hence that traitor from our sight, For by his death we do perceive his guilt.

And God in justice has reveal'd to us

The truth and innocence of this poor fellow,

Which he had thought to murder wrongfully.

Come, fellow, follow us for thy reward.

[Exeunt.]

“The real names of these combatants were John Daveys and William Catour, as appears from the original precept to the sheriffs, still remaining in the Exchequer, commanding them to prepare the barriers in Smithfield for the combat. The names of the sheriffs were Godfrey Boloyne and Robert

to guide his readers through the labyrinth in which himself was lost. After referring, as subsequently Blackstone, to Velleius Paterculus, to show,

Horne; and the latter, which occurs in the page of Fabiani's Chronicle that records the duel, might have suggested the name of *Horner* to Shakspeare. Stowe is the only historian who has preserved the servant's name, which was *David*. Annexed to the befor-ementioned precept, is the account of expenses incurred on this occasion, duly returned into the Exchequer. From this it further appears, that the erection of the barriers, the combat itself, and the subsequent execution of the Armourer, occupied the space of six or seven days; that the barriers had been brought to Smithfield in a cart, from Westminster; that a large quantity of sand and gravel was consumed on the occasion, and that the place of battle was strewn with rushes."

"In Mr. Nicholls's 'Illustrations of the manners and expenses of antient times in England,' 1797, 4to. is the Exchequer Record of expenses in the Appeal John Daveys and William Catour." *Douce's Illustrations of Shakspeare*, vol. ii. p. 8.

In this age of popular sobriety, a caution, to those who may have occasion to wage Battle, to beware of Malmsey and *eau-de-vie*, may be unnecessary; and yet Mr. Poynder may add, with advantage, the case of the tipsy Armourer, to his valuable memoir on Dram-drinking. But, for us, it is not perhaps impertinent to recollect, that the mistaken kindness of the Armourer's neighbours was only an abuse of the solemn provisions of the Law of Appeal, which called on the Lord, upon whose lordship the battle was fought, to provide 'the combatants freely *à manger et boire* ; especially as this particular is further connected with some other just and grave considerations, belonging to the process, and which further show the humanity, or at least the justice, of the *barbarous ages*. See page 81, note.

that all questions which were decided among the Romans by legal trial*, were terminated among the Germans by arms; and to Stiernhöök for a corresponding custom among the ancient Swedes, this writer adds, “ It seems likewise to be probable, from a law quoted by Stiernhöök, in the treatise I have just mentioned, that the Judicial Combat was originally permitted, in order to determine points respecting the *personal character, or reputation of individuals*, and was afterwards extended, not only to criminal cases, but to questions concerning property. The words of the law are, “ If any man shall say to another these reproachful words, ‘ You are not a man equal to other men,’ or ‘ You have not the heart of a man,’ and the other shall reply, ‘ I am a man as good as you ;’ let them meet on the highway. If he who first gave offence appear, and the person offended absent himself, let the latter be deemed worse than he was called ; let him not be admitted to give evidence in judgment, either for man or woman, and let him not have the privilege of making a testament. If the person offended appear, and he who gave the offence be absent, let him call upon the other thrice, with a loud voice, and make a mark upon the earth ; and then let him who absented himself be deemed

* By the phrase “ legal trial,” Robertson means, not “ lawful trial,” but “ trial at law,” or by civil process.

infamous, because *he uttered words which he durst not support*. If both shall appear, properly armed, and the person offended shall fall in combat, let a half compensation be paid for his death; but, if the person who gave the offence shall fall, let it be imputed to his own rashness. The petulance of his tongue has been fatal to him: let him lie in the field, without any compensation being paid for his death." *Lex Uplandica*, ap. *Stiern.* p. 76. By the law of the Salians, if a man called another a *hare**, or accused him of having left his shield in the field of battle, he was ordained to pay a large fine. *Leg. Sal. tit. xxxii, § 4. 6.* By the law of the Lombards, if any one called another *arga*, i. e. 'a good-for-nothing fellow,' he might immediately challenge him to combat. *Lex Longob. lib. 1. tit. v, § 1.* By the law of the Salians, if one called another *cenitus*, a term of reproach equivalent to *arga*, the fine which he was bound to pay was very high. *Tit. xxxii. § 1†.*

35. In the paragraph that is now finished, we possess, as I persuade myself, the whole secret of the *very humble and secular* origin of Trial by

* This passage probably explains many superstitions concerning the *hare*. It was an ill omen for a hare to cross the march of an army; doubtlessly because the animal was the symbol of cowardice and flight.

† Robertson, Charles V, vol. I, note xxii.

Combat. “*Personal character or reputation of individuals*”—the *vindication* of that character—is the sole principle on which it rests;—and *honour*—in the *lawful duel* of the Judicial Combat, as in the *unlawful duel* of the present day—is the thing sought to be defended. Whatever is the offence with which the accuser charges the accused, the *courage* to make good the assertion is that to which the accuser lays claim—and to lay the foundation of Battle, the *lie* must first be given on both sides. This done, the *honour* of each party is at stake; and the principle, *That a brave man will utter nothing which he is not ready to DEFEND BY HIS BODY*, is that upon which the weapons are raised. We have seen, (page 63) from the form of a Count of Appeal, as in use among us at this day, that the first step of an Appellor against an Appellee, is to challenge a *denial* of the charge: “And this, IF HE WILL DENY,” &c. So again, preparatorily to the combat, the Appellee, having sworn to a denial of the charge, the Appellor exclaims, “Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that THOU ART PERJURED, AND THEREFORE PERJURED, because that thou didst feloniously murder my father, &c.” Thus, it is the imputation of perjury—the personal dishonour—which is to be wiped away—and not a divine revelation which is to be sought—by the Judicial Combat.

36. But I am to show, that it is the Appellor, and not the Appellee—the Plaintiff and not the Defendant—who is, in reality, the original challenger to the combat; a proposition which is to be maintained with extreme facility, since nothing is more idle than to suppose that Battle is a something added to a pre-existing law of Appeal;—since Battle was, in reality, the thing immediately sought by the ancient process of Appeal;—since, as I shall establish, there was originally no Appeal without Battle;—and since, as I now, and hereafter, shall emphatically and fearlessly assert, The *true* GENERAL maxim of our law is, THAT WHERE THERE CAN BE NO BATTLE, THERE CAN BE NO APPEAL.

37. Blackstone, who only talks in the popular strain concerning Trial by Battle, gives the following account of the process in Appeals of Felony;—an account which appears to agree generally with the practice of our Courts—though it is deficient as to the Count of Appeal—but which I must presently take leave to compare with the accounts in original and more ancient authorities. “The Appellee,” says the Learned Commentator, “when appealed of felony, pleads *not guilty*, and throws down his glove, and declares, he will defend the same by his body; the Appellant takes up the glove, and replies, that he is ready to make good the Ap-

peal, body for body; and thereupon the Appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect: ‘Hoc audi, homo, quem per manum teneo, &c.’ ‘Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God and the Saints; and this I will defend with my body, as this Court shall award.’ To which the Appellant replies, holding the Bible and his antagonist’s hand in the same manner as the other, ‘Hear this, O man, whom I hold by the hand, who callest thyself Thomas by name of baptism, that thou art perjured, and therefore perjured, because that thou feloniously didst murder my father, William by name. So help me God and the Saints; and this I will prove against thee by my body, as this Court shall award.’ The Battle is then to be fought, &c.” Now the reader is already warned, that this account is defective, inasmuch as it does not include the words in which the Appellee is “appealed of felony;” a deficiency by means of which it conceals the important fact, that *the Appellant is the party challenging to combat*, and the Appellee only the party receiving and accepting the challenge! This important fact, too, the modern introduc-

tion of some ambiguous words (of which it is easy to give the history and explanation) serves partly, but not wholly, to conceal. The existence of a lurking challenge was to be conjectured, from the remaining terms of the Count; and it is to be found undisguised in the original formula and process.

38. In the work entitled *Le Grand Coustumier de Normendie*, prosecution for murder, by Appeal, is said, in the text, to be “conducted in this manner:—R. complains of L., who has murdered his father feloniously in the peace of God and of the Duke, and that he is ready to prove it, and make him acknowledge it, *en une heure du jour**;” and the commentary declares, “From this text may be learned how prosecution for murder is conducted by *Wager of Battle*†.”

* “Suyte de meurdre doit estre faict en ceste maniere. R. se plaint de L., qui a meurdry son pere felonneusement en la paix de Dieu et du Duc, que il est prest de prouver, et de lui faire congnoistre, en une heure du jour.” *Le Grand Coustumier du Pais et Duché de Normendie*, &c. &c. Avec plusieurs additions, &c. Par scientifique personne maistre Guillaume le Rouille d’Alençon, &c. Rouen. 1539. fol. De Suyte de Meurdre. chap. lxxviii. fol. lxxxvii.

“*En une heure du jour*,” literally “in an hour of the day.” Does this expression import “forthwith,” or “at any time,” or “in the twinkling of an eye?”

† “Par ce texte peut apparoir come len faict suyte de meurdre par gage de Battaille.” *Ibid.*

How prosecution for murder is conducted, *when not by Wager of Battle*, that is, when not at the "suit of the party," but at the suit of the sovereign, is the subject of a second discussion, in the same work and chapter. Further, the commentator, M. d'Alençon, adds, that there ought to be information precedent before murder is prosecuted by Wager of Battle*; and, upon investigation of this point, we shall discover, that before we come to Blackstone's "*Hoc audi*," and declaration of the Appellee, that he will defend the plea of *not guilty* by his body, the Appellant has made his charge, and *offered to PROVE the same by his body*; and that the "*Hoc audi*" is only the Appellee's challenged *denial*, "*de mot en mot*," of the charge, and a declaration, that he is ready to DEFEND his denial in like manner.

39. But the question is placed in a still clearer light by the more ancient volume of the Assises de Jerusalem; between which, and the Grand Coustumier de Normendie, there are some variations. In this latter work, part of the process of Appeal is described as will be now seen. The passage quoted occupies the eighty-seventh chapter, of which the title is this: "What ought to be done and said by one who makes an

* "On doit sçavoir quil convient quil y ait information précédente, avant que len puisse faire suyte de meurdre *par gaigne de Battaille*." *Ibid.*

Appeal of Murder, when the murderer is present in Court, and he has appealed him." The chapter runs thus: "He that will now make Appeal of Murder, of a man, woman, or child, who is murdered, and shown to the Court, as is before said, (he or she whom he appeals being present in Court) ought to cause to be said in the Court, by his counsel, 'Sir, such-an-one complains to you of such-an-one, who here is, who has murdered such-an-one; and if he denies it, he is ready to prove it by his own body against his, and he will make him dead or recreant *en une oure dou jour*; and here is his gage:' and the counsel names all the three; the Appellor, the Apellee, and the murdered person; and then the Appellor kneels before the Court, and presents his gage*."

* "Qui veaut maintenant faire Apeau de Murtre, d'ome, ou de feme, ou d'enfant, qui ait esté murtri et mostre à Court, si com est devant dit, et celui ou cele que il veaut apeler est present en la Court, il doit faire dire en la Court, par son conseil, 'Sire, tel se clame à vous de tel, qui la est, qui a tel murtri; et se il le noie, il est prest que il en preuve de son cors contre le sien, et que il le rende mort ou recreant en une oure dou jour; et vées ci son gage:' et nome tous trois, l'Apeloir et l'Apelé, et le murtri. Lors s'agenouille l'Apeloir devant le Seignor, et li tent son gage." Assises et Bons Usages du Royaume de Jerusalem; tirés d'un Manuscrit de la Bibliothèque Vaticane. Par Jean d'Ibelin, Comte de Japhe, &c. &c. Paris, 1690. fol. Chap. lxxxvii. "Qui veaut faire Apeau de Murtre, et le Murtrier est en la Court present, que il doit faire et dire quant il l'a apelé."

So, again, in Appeal of Homicide, the same *Wager of Battle* is offered by the Appellor:—
 “He that will to make an Appeal, of a man, or woman, or child, or other, who has been killed otherwise than in murder, and to give effect to his Wager of Battle, (*mettre soi en droit gage*) if his adversary is unable to avoid it, (*ne s'en sait garder*) causes to be said as follows to the Court, in the presence of him whom he desires to appeal of the offence, after the body and the wounds have been shown to the Court, as is before said:—‘Sir, such-an-one (naming him) complains to you of such-an-one, who here is, who has killed (*murtri*) such-an-one, and given the wounds of which he is dead; and if he denies it, he is ready to prove it by his own body against his, and to make him dead, or else recreant, *en une oure dou jour*: and here is his gage.’ And if he, concerning whom the complaint is made, denies the charge, and puts himself on his defence, and presents his gage, then, he that is of counsel for the Appellor says as is before said, &c.*” It is only after this elucidation, that we can fully understand the brief account contained in the *Grand Coustumier de Normendie*, and detect the deficiencies in that of Blackstone. “R. complains,” says the *Grand Coustumier*, “of L., that he has murdered his father feloniously, &c.” and is ready to prove the same [*by Battle*] *en une heure du jour*. If L. denies it

* *Idem*, chap. cx.

word for word, (see Blackstone's "*Hoc audi*," above) and puts himself on his defence, and presents his gage, *the Court ought first to take the gage of the Appellee, and then that of the Appellor*, and each ought to give pledges to submit themselves to the law. It is here plain, that the wager, or tender of pledge of Battle, comes first from the Appellor, as we have seen more expressly from the Assises de Jerusalem. For the rest, why the gage of the Appellee is to be first taken by the Court, though not tendered till after the gage of the Appellor has been given, appears from the comment on the text: "The gage of the defendant should be taken first; and the cause is, that it is he who is suspected, and charged by information." If the Appellor's gage were presented first, there could be no need to explain why it should be first taken. The commentary, indeed, adds, "That the Appellee ought first to *throw down* his gage, and the Appellor afterward *." But here the Commentator not only mistakes the practice which we have seen so rationally detailed in the Assises de Jerusalem, but also stultifies his own explanation. I submit, hence, that in the modern practice of our Courts, there is an important departure from the ancient forms

* "*Len doit premièrement prendre le gaige du defendeur : et la cause est ce qu'il est soupçonné et chargé par information, qu'il le prent et lye, et pour ce on prent premièrement son gaige, et après on prent celuy de l'acteur.*" *Le Grand Coustumier*.

and *reason* in prosecution for felony by Appeal, and that the order of the proceedings should be, First, that the Court is to be satisfied that there is good reason for obliging the accused to answer the summons of the Appellor*; secondly, that the

* “On doit sçavoir qu’il convient qu’il y ait information précédente, avant que len puisse faire suyte de meurdre *par Gaigne de Battaille*.” *Le Grand Coustumier*.

In what manner *information précédente* is to be obtained, has already been partly seen, from the Assises de Jerusalem, where we have found that the body of the murdered person is to be shown to the Court; but the following, from the same volume, is more full:—“He that will make Appeal of Murder ought to cause the murdered body to be brought into the front of the mansion of the Lord, or to the place to which it is customary to bring murdered bodies; after which he should present himself to the Lord, and demand Counsel to be given him; and when he has obtained Counsel, his Counsel should say, ‘Sir, send, and cause a view to be taken of the body which lies here, and which has been murdered;’ and the Lord should then send three of his people, one in his own stead, and two as a Court¹; and the three men whom the Lord sends, should go and view the body, and then return to the Lord, and say, in the presence of the Court, ‘Sir, we have viewed the body which you sent us to view, and have viewed the wounds which are upon it;’ and here say how many wounds there are, and in what part they are, and with what they appear to them to have been given. And if there are no wounds, and there is any other sign of murder, they should tell it to the Lord; and if there is no sign on the body, from which it seems to them to have been murdered, they should say to the Lord, ‘Sir, we have viewed the body, and we have seen neither bruise

¹ Is this the origin of the appointment of *three* judges to the bench of every Court of Law? And have we here, also, the rudiments of a Coroner’s Jury?

Appellee, if permitted to prosecute, should present his pledge of Battle; and, thirdly, that it

nor wound, nor any thing from which it seems to us to have been murdered.' And, now, *if there is on the body any thing from which it seems that it has been murdered*, according to what has been reported to the Lord, in the Court, he that will make Appeal, ought to say, by his Counsel, 'Sir, such-an-one complains to you of such-an-one, who has murdered such-an-one; let him come into your presence, *that you may hear how he will support his complaint*;' and the Counsel should call all the three by their names, and tell their surnames, if he knows them: that is to say, his for whom he is Counsel, his whom he charges with the murder, and that of the murdered person. And now the Lord ought to make search after him who is charged with the murder, if he is not of his own lordship, and lodge him in his prison; and now, when he has him in his power, should make known the same to the complainant."—"Qui veaut faire Apeau de Murtre, il doit faire apporter le cors murtri devant li hostel dou Seignor, ou à leue que il est establi que l'on porte les murtris; aprez doit venir devant le Seignor, et demander Conseil; et quant il aura Conseil, si die son Conseil: 'Sire, mandez faire veir ce cors qui la val gist, qui a esté murtri.' Et le Seignor y doit alors envoyer trois de ses homes, l'un en son leue, et deus com Court; et les trois homes que le Seignor y envoie doivent aler veir ce cors, et puis revenir devant le Seignor, et dire li, en presence de la Court, 'Sire, nous avons veu ce cors que vous mandastes veir, et avons vehu le cos que il a;' et doivent dire quant cos a, et en quel leue il les a, et de quel chose il lor semble que il aient esté fais. Et se il ni a cos, et il y a aucun autre entresigne par que il lor semble que il a esté murtri, il le doivent dire au Seignor; et se il n'avoit aucun entresigne en celui cors, par que il lor semble que il ait esté murtri, il doivent dire au Seignor, 'Sire, nous avons vehu ce cors, et nous ni avons veu nul cos ne blessure, ne nulle chose par que il nous semble que il ait esté murtri.' Et se il y a en cel cors aucune

should be in the choice of the Appellee, either to plead guilty, or to present his pledge of Battle

chose parquoil il semble que il esté murtri, maintenant, après ce que les trois devant dit auront dis au Seignor, en la Court, celui qui veaut faire l'Apeau doit dire, par son Conseil, au Seignor, 'Sire, tel se clame à vous de tel, qui a tel murtri; faites le venir en vostre presence, si orés com il portera son clam contre lui;' et l'avantparlier doit nomer tous les trois par lor nom, et dire lor surnoms, se il le set; ce est assavoir, celui à qui Conseil il est, et celui seur qui il met sus le murtre, et le murtri. Et maintenant le Seignor doit faire querre celui à qui on met sus le meurtre, se il n'est son home, et metre le en sa prison; et maintenant que il l'aura en son pooir doit le faire savoir au Clamant. Et il me semble que se le Seignor veaut bien faire, il doit mander à celui qui est arresté pour le murtre trois de ses homes, l'un en son leuc, et les deus autres com Court, et celui qui est au leuc dou Seignor li doit dire, 'L'on te met tel murtre sus; coment et pourquoi le fis tu, et qui fu o toy à faire le?' &c. *Assises*, Ch. lxxxv.—From all the foregoing, it will be seen, that, as early contended for in the text, the prosecution for Murder by Appeal was never anciently contemplated but as the first and only process against the accused, and that its employment to procure a second criminal trial is as grievous an abuse of the law of our ancestors, as it is of the rules of legislative justice. The *Assises de Jerusalem* is full upon the subject of preventing the accused from being exposed to a second challenge to Battle'. Had he pleaded, in the ancient Courts, that he had already fought an Appellant in the case, does any one doubt that this species of *information précédente* would have been held by the ancient Courts as a complete answer to the Appeal? and what is now so easy, as well as so just, as for Parliament to enable our modern Courts to tread in their steps?

also ; for it does not appear, that in prosecution by Appeal, the slightest notion was entertained of referring the issue to an inquest or jury. **AN APPEAL IS A DEMAND OF BATTLE.** “Apeleoir de Battaille,” a summoner to Battle—a suitor for Battle—is a title given, in the Assises de Jerusalem, to an Appellor.

40. Thus, the Appellor, and not the Appellee, is the real challenger to combat ; but the reader will require an explanation of the only obscurity remaining, namely, why, in the modern Count of Appeal, the words, “And this, if he will deny, he is ready to prove according as the Court shall here consider thereof,” are substituted for the words, “And this he is ready to prove by his body,” unless a discontinuance of the challenge to combat is intended ? The reader will observe, that the substituted words are only more general in their import than the others, the alternative of Battle being equally attainable under both, but the Court not being confined by these latter to that alternative only. In point of fact, the substituted words are a translation of words which occur, in other places, in the same Assises de Jerusalem ; and their transplantation into modern Counts of Appeal of Murder may be believed to require no other explanation than what follows. *According to the early writers, there are no Appeals without Battle, because champions are allowed to those who are deemed by the law unable to fight.*

Hence, in the Assises, the Appellor uniformly challenges the Appellee to the combat. At later dates, however, two important alterations have taken place: first, the description of persons who are capable of becoming Appellants has been immeasurably restricted; and secondly, with respect to the few remaining Appellants, no champions have been allowed: but, where the Appellant is deemed to be unable to fight, the Appellee is sent to Trial by Jury. It is this modern alternative, therefore, which is referred to and provided for, in the modern application of the words “according as the Court here shall consider thereof.”—Thus I have established, as I think, two propositions which I advanced: first, that Trial by Battle is not *impious*—that it has nothing even religious in its foundation; and, secondly, that if any odium attaches to it, that odium belongs to the Appellor, who seeks it, and not to the Appellee, who is forced to accept it; who, in ancient time, had no escape from it, and who, in our own day, has no escape but in a second criminal trial. The truth simply is, that an Appeal is an application to a Court of Justice, for the appointment of a *lawful duel**.

* Montesquieu strangely attempts to derive our modern *unlawful duels* from the ancient Trial by Battle, and from the notions of honour which belonged to it. Alas! why did he not derive Trial by Battle from *unlawful duels*—from duels un-legalized—and from the notions of honour which gave them rise? But writers incessantly forget, that men and their sentiments,

Modern innovations have created some exceptions to this general definition; but such is its radical character. *An Appeal* (according to all the authorities that have now been produced) is, even now, in a general sense, a prosecution by *Wager of Battle*.

41. If further proof be desired, that the principle of Judicial Combat is *vindication of character*, and the support of either combatant's veracity, and not an appeal to the Judgment of God upon the matter *in dispute*, it is to be found in the combats to which the witnesses and judges themselves were exposed, upon Appeals of Felony. The Appellee, and doubtlessly the Appellor likewise, might bring charges, both against the witnesses and the judges, at the trial, (for, let it never be forgotten, that trial, either by witnesses or by judges, anciently preceded the allowance of Battle, that is, the allowance of prosecution by Appeal) and challenge any or all of them to fight him. It is recorded, that at the preparation for the latest Battle waged in the Court of Common Pleas at Westminster*, (even though it was previously known that there was to be no Battle,) the Court assembled

and their passions, existed before their institutions; and thus, in all their speculations upon human history, begin where they should leave off.

* 13 Eliz. A. D. 1571. There was afterward one in the Court of Chivalry, in 1631; and another in the County Palatine of Durham, in 1638.

“ non sine magna jurisconsultorum perturbatione† :” but what would have been the “ perturbation,” if the Judges themselves had been challenged to come down into the arena! The Assises de Jerusalem contains a chapter which treats of “ What he ought to do and say, that will impeach the Court, (*la Court fausser*) and how and why all the members of the High Court ought to fight him;” and it sets out thus: “ If a man will impeach the Court, (*veut la Court fausser*) and say, that in regard either to its proceedings, or judgment, or cognizance, or to the record, the Court has done falsely, or has not proceeded according to evidence, (*que il n'est mie de droit fait*) or will in any other manner impeach or charge the Court with acting *falsely*, &c. and offer to the Court to defend the same against their bodies by his own, and if he will prove them *false*, it is proper that he should fight all the members (*homes*) of that Court, one after the other, *as well those who were not present at the cognizance, or proceedings, as those who were*; for he impeaches (*fausse*, falsifies) the Court, he impeaches (*falsifies*) not only those who took part in the proceedings, judgment, or record, but all those who are members (*homes*) of that Court; and because the *honour* or *disgrace* is common to all who belong to the Court, there-

† Spelman's Glossary, 103. Sir Henry Spelman was himself a witness of the ceremony.

fore all should defend themselves by their bodies against him that will impeach (falsify) it: for the Court that is impeached (falsified) can take no proceeding, nor cognizance, nor record, which is valid, if any one will contest it: for, as a man who is attainted, vanquished, and convicted of *falsehood*, can never afterward bear testimony in a Court, &c., so a Court which is impeached (falsified) can have no proceeding, no cognizance, nor no record, which is valid, if it is excepted to; and those who belong to that Court, have lost, for evermore, all voice and plea in Court, and can none of them bear lawful testimony, because each must be held to be convicted upon the charge, as before said." The same chapter then goes on to present us with a picture of the Battle between the prisoner or suitor and all the Court: "And he who has said any of the before-said things against the Court, to impeach (falsify) the Court, as before said, offers his gage against all the Court and the record; and when all are in the field, to make Battle, he ought to be on one side, and all the members (*homes*) on the other; and one of the members (*homes*) whichsoever he makes choice of, ought to fight him singly, man to man; and if the member, (*home*) who fights is vanquished, then one of the others ought to go wherever he that would impeach (falsify) the Court is; and if he should now vanquish this other, then a third should go in like manner;

and thus he should fight them all, one by one, and should vanquish them all in one day ; and if he does not vanquish them all in one day, then he ought to be hanged*. The chapter contains further rules, in regard to the Battles of the Courts and their suitors, which, with the passage thus far hastily translated, will be seen in the note below† : but it is now time to say a word

* A newspaper wit has lately diverted himself and others with “ Anticipation” of a *Duel* in Tothill Fields : but what will such a writer have to say to the *battle royal* in the text ? For the rest, since Robertson tells us that the judges (peers or assessors) of a Baronial Court were sometimes two hundred in number, and since their appellant was to vanquish all in one day, or be hanged, there seems little chance that he who was so hardy as to assail the purity of such a Court could escape a halter !

† “ Se un home veaut la Court fausser, et dit que l'esgard, ou la conoissance ou le recort que la Court a fait, est faus et deloyalement fait, ou que il n'est mie de droit fait, ou en aucune autre maniere la venille fausser, disant aucune des avant dites choses que la Court aura fait ou retrait, tous ceaus de la Court doivent maintenant dementir et offrir à la Court aleauter de lors cors contre le sien ; et se il la veaut fausser, il convient que il se combatte à tous les homes de celle Court, l'un après l'autre, et auci ceaus qui n'auront esté à la conoissance, ou à l'esgard, ou à recort faire, com ceaus qui l'auront fait ; car, se il fausse la Court, il ne fausse pas seulement ceaus qui l'esgard, ou la conoissance, ou le recort auront fait, mais tous ceaus qui sont homes de celle Court, et pour ce que le honour ou la honte est à tous commune, ceaus qui sont de celle Court defendre et aleauter la doivent de lors cors contre celui qui la veaut fausser : car Court qui est faussée ne peut puis faire esgard, ou conoissance,

on the corresponding situation of the witnesses, including the bringer of an Appeal. The Ap-

ou recort, qui soit vaillable se aucun veaut dire alencontre : car, enci com home attaint, vaincu et prové de fausseté, ne peut porter garantie, auci ne peut porter home qui soit de la Court fausse garantie qui soit vaillable qui alencontre veaut dire, ne la Court faussée ne peut puis faire esgart, ne conoissance, ne recort qui soit vaillable qui veaut dire alencontre, et tous ceaus de celle Court ont perdu à tous tens et vois et repons en Court, et ne peut plus nul des eaus loyal garantie porter, pource doit chascun d'ayus prendre le fait sur soi en la maniere devant dite. Et se celui qui a dit aucune des avant dite choses contre la Court, pour la Court fausser, si com est dessus dit, et li tent sont gage contre tous ceaus de la Court et le recort, aud quant il [s] sont au champ, pour la Bataille faire, il doit estre d'une part, et tous les homes d'une autre, et une des homes, lequel que il ehliroint, se doit premier combattre vers lui soul à soul ; et se celui qui est party est vaincu, maintenant se doit mouvoir un des autres en quelque point que celui qui vodra la Court fausser sera, et se il vaine maintenant cel autre, un autre doit maintenant se mouvoir, et enci se combatte à tous, un à un, et se il ne vainque tous en un jour, il doit estre pendu. Et se aucun de ceaus de la Court dit après une des dites choses, et retrait qui a ce fait, et aucun die, ' Je l'ay fait,' et il n'en face mention de la Court, l'autre peut bien dire à tous ceaus qui se diront, ' Je dis, que vous dites, que vous avés ce fait ; et dis, que l'avés fait fausement et delhoyaument ; et se vous volés néer, je suis prest de prover le vous de mon cors contre le vostre, (ou les vos, se il sont plusiors) et rendre vous mort ou recreant en une oure dou jour ; et vées ci mon gage ;' et li tend au Seignor, et à tous ceaus qui se auront dit se peut combattre sans la Court fausser : et [se] celui ou ceaus que l'on enci faussera ne s'en deffendent et aloyautent de lors cors, il sont attains d'estre faus ou delhoyaus, et ont

pellor might impeach all or any of these, *contra-dict* them, or say that they are themselves attainted, infamous, &c. and challenge them to Battle; so, that as is said in the Assises, “a man or woman bringing an Appeal of Murder incurs the peril of a shameful death.” “Not only,” says Robertson, (referring to these facts) “might parties, whose minds were exasperated by the eagerness and the hostility of opposition, defy their antagonist, and require him to make good his charge, or to prove his innocence, by his sword; but witnesses, who had no interest in the issue of the question, though called to declare the truth, by the laws which ought to have afforded them protection, were equally exposed to the danger of a challenge,

perdu vois et respons en Court à tous tens; et se il plusiors sont, il se doit combatre à tous, un à un, com il est dessus dit; et se il les vaine tous, pour ce n'est pas la Court faussée, et ne pert rien de son honor, et le jugement que elle a fait est estable, et tous ceaus que il vainquera seront pendus, et il sera pendu se il est vengu. Et se plusiors die, ‘Nous feimes ce,’ et il ne s'en veant prendre que à un, il ne peut faire auquel que il vovra de ceaus que l'auront enci dit, car il ne dit rien contre la Court; et se il se prent à plusiors, et il les [ne] vaine tous en un jour tous ceaus contre qui il se doit combatre, il doit estre pendu, et tous ceaus que il vainera le doivent estre auci; ne pour nul de ceaus que il vainque tous les veinquist il tous ne doit demorer que l'esgart ou la conoissance que la Court aura fait ne doie estre tenus; car il n'a pas la Court faussée.”
Assises de Jerusalem. ch. cxi.

and equally bound to assert the *veracity* of their evidence by dint of arms. To complete the absurdity of this military jurisprudence, even the character of a Judge was not sacred from its violence. Any one of the parties might interrupt a Judge, when about to deliver his opinion; might accuse him of iniquity and corruption in the most reproachful terms; and, throwing down his gauntlet, might challenge him to defend his integrity in the field: nor could he, without infamy, refuse to accept the defiance, or decline to enter the lists against such an adversary." While, however, I avail myself of the authority of this celebrated and accomplished writer, to confirm, by his extended reading, the historical matter in hand, I must here, as in other places, protest against the spirit in which he has treated of it. He seems not to have observed the coincidences of the maxims of this "military jurisprudence," with those of our own civil system, as to what relates to the general character and credibility of witnesses, and as to exceptions to the opinions and conduct of Judges. With respect to the latter, too, he, in his turn, in a manner, falsifies history, by omitting to caution his readers against confounding the military judges (*hommes de la Cour*) who are in question, with the gownsmen of our modern Courts; thence producing a change of character which wholly alters the scene, and vitiates our judgment upon its merits. The truth

is, that we see, in what has been presented, the rugged and perhaps unsightly ore of that metal with whose weight and lustre we are still delighted; the seeds of those liberties, and the foundations of that practice, upon which, to this day, we set so high, and so deserved a value. In addition, let it be observed, that here, too, we see the foundation of our law of libel, and of all our law of character, with only the simple substitution of civil for military remedy. Whoever spoke ill of another, was bound to defend what he said by his sword, as he is now bound to defend it in a Court of Law; and is it not evident, that civil remedy for libel is not founded, as has been idly advanced, upon *a fiction of its tendency to a breach of the peace*, but on a reality? and that wherever men are wronged, they must be allowed, either their remedy at law, or to seek their own remedy *by their bodies*?

42. But the design of the slight research in which we have now indulged, is not that of amusing ourselves with accounts of ancient customs, but the discovery of the principle upon which those customs were founded and sustained; and we have now, I think, distinctly seen, that the basis of all Judicial Combats is, not that which has been asserted and echoed by so many eminent lawyers, historians, and philo-

sophers, and from these adopted by the multitude—the principle of a divine decision, and an identity with Trial by Ordeal—but a principle exclusively of “honour” and “disgrace;” of reputation and infamy;—and the maxim, (of the merits of which we will here say nothing) that a man is not to utter that which he dares not defend by his body. We shall even find, in what we have just seen, (and it will strengthen the position) the origin of the phrase “good men and true,” in the description of Jurors, (the Judges, *hommes de la Cour*, intended in our quotation) for from these our Jurors have sprung. The opposite of *true* is *false*; and to be *false* men, was what was imputed to them by him who challenged them to fight. To be “true men,” was, in the language of the Norman Courts, *d’être hommes loyaux*, or *hommes qui ont de la loyauté*. But the act of fighting in defence of their *truth* is, in the passage that has been cited in the note, expressed by the obsolete verb *aleauter* or *aloyauter*, whence *s’aloyauter*, to justify oneself, or to approve one’s *truth*. The French language retains, at this day, no other traces of this verb, than that of the impersonal verb, *aloyer*, “to bring metal to its proper standard,” or *truth*; and the noun substantive *aloy*, the substance employed for that purpose. “Alloy” (the English word) signifies base metal; but that base metal, makes

the compound standard or *true**. Thus *s'aloier*, or *s'aloiauter*, implies, in the text quoted, the act of defending one's truth or character by Battle, and not that of appealing to God to make it evident; unless to the act we chuse to add a persuasion, that God will preside over it, and that it will not, as in the words of Solomon, be "left to time and chance." And thus, whether it is *impious* or not, to expect the divine interposition on its occurrence, Trial by Battle, which essentially refers to no divine interposition, is not *impious*.

43. But it will be an additional proof that Trial by Battle is not a mode of Trial by the Judgment of God, and, beside, serve our Argument in other respects, if we can show, That Trial by Ordeal, or the Judgment of God, actually forms part of our criminal jurisprudence at this day, and subsists in a form which will be generally thought directly opposite to Trial by Battle; namely, in our Criminal Trials by Jury.—It is known, that a culprit, on being arraigned, is required to plead, either "guilty," or "not

* Is it not hence that we should derive the modern French verb impersonal, *aloier*, in opposition to the various suggestions of English and French etymologists? "*Aloier*," say the dictionaries, "to bring gold or silver to a right standard." Is not this "*Fà loier*," ("*Fà loiauter*") to make the metal "true" or just?

guilty," as a necessary preliminary to his *trial*; and that upon pleading "not guilty," he is asked "*how* he will be tried," to which he is to reply "By *God* and the country." The origin and meaning of the introduction of the name of God into this reply has been differently explained; and a learned author, as cited by Blackstone, has suggested, that "the proper answer is, 'By God or the country;' that is, by *Ordeal*, or by Jury; because the question supposes an option in the prisoner."—This conjecture is probably erroneous. Among the most ancient and universal modes of trial, appear to have been, 1. The Oath of the party; 2. Wager of Law; 3. Wager of Battle; and, 4. *Ordeal*, (*Judicium Dei*) or Judgment of *God*. To these have succeeded, 5. The Trial by Judges; and, 6. The Trial by *Jury*, or by "the *Country*." The trial, then, by Jury, or by "the *Country*," found the Trial by God previously existing; and at its introduction, among a people accustomed to rely on the "Trial by *God*," it was necessary to accommodate the feelings, and therefore to continue, in some degree, the language, which had been previously held in respect. To have rejected the "Trial by *God*" would have been regarded as *impious*; the wisdom of the legislator, therefore, was content to *blend* it with the Trial by *Jury*; and the culprit was made to say, that he would be tried by *God*, either conjointly with, or

through the ministration of, the *Country* or *Jury*. Nor was such a practice inconsistent with the progress of religious philosophy, which, while it now taught mankind to regard even as sinful the expectation of immediate and miraculous interpositions of Providence, yet earnestly inculcated a belief in its presiding influence, and could represent the *act of God* to be as distinctly visible in the production and veracity of human witnesses, and in the enlightening of the minds, and disposing the hearts of a Jury, as it could be if it had made “trees to speak, and stones to move”—fables which required the credulity of an earlier age. The proper answer, therefore, is, “By *God and the Country* ;” that is, by *both* ; and the culprit has no option. The words are merely a form in which he is instructed to join issue with his prosecutor, in the hope of that “good deliverance” which he is never precluded from the hope of obtaining from “*God and the Country*,” to whose united trial he commits himself. Thus the Judgment of God appears in the daily practice of our law, much rather than in Trial by Battle.

44. A writer has recently said, “I incline to consider this proceeding [Trial by Battle] as much obsolete as the *Ordeal* ; and am almost as much surprised to find it for a moment enter-

tained, as I should be to hear of an appeal to the *Judicium Dei*; and, in fact, Wager of Battle is nothing else." "It is undeniable, that Wager of Battle was once a legal proceeding; but so was the Ordeal. Mr. Barrington could not discover when the Ordeal was abolished; nor when the Wager of Battle was abolished; but surely the good sense of the Judges will presume, &c."—Trial by Ordeal, like Trial by Wager of Law, or Compurgation*, was part, and a most popular

* Wager of Law (*vadatio legis*) is so called, because the parties gave pledges or gages (*vadii*) to try the suit by Battle; so, here, the pledges were given to comply with the law. "The manner of waging or making law," says Blackstone, "is this: he that has waged or given security to make his law, brings with him into Court *eleven* of his *neighbours*—for by the old Saxon constitution, every man's credit in Courts of Law depended upon the opinion which his neighbours had of his veracity. The defendant, then, standing at the end of the bar, is admonished by the Judges of the nature and danger of a false oath; and if he still persists, he is to repeat this or the like oath, &c." And thereupon his neighbours or *compurgators* shall avow [*aver*] upon their oaths, that they believe in their consciences that he saith the truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*." These oaths incur a discharge of the defendant. Blackstone, insists that the number of compurgators must be *eleven*, in order to make, with the defendant, the number of twelve; and, after the institution of Juries had really made progress in this kingdom, it is very probable that the number eleven was in some measure fixed. But the regulated number

part, of the Law of the Land, at the Norman Conquest. It was in high favour with our Saxon ancestors; it was particularly valued in the trials of women, who could not defend themselves by Battle, and who, perhaps, could not, so easily as men, bring a host of Compurgators to answer for their innocence*. The trial or deliverance could indeed suit few or none beside those of some standing in society; and hence the poor of both sexes must have looked upon the Ordeal as their rock of safety. The earnestness with which the nation clung to both, is manifested by the existence of numerous Charters, or grants of desired privileges, in which, in bar of the Norman policy, Ordeal and Wager of Law were permitted. Trial by Jury had little or no popularity; Trial by Battle had its dangers; and

was, in some instances, as high as forty, and the primitive notion seems to have been, that the number of compurgators on the part of the defendant, should be double that of the witnesses on the part of the plaintiff; whence we may account for the doctrine of Fleta, who thinks *four* or *six* compurgators sufficient, and the information conveyed by Robertson, who asserts that they were sometimes as many as *three hundred*. Blackstone countenances a notion, that Wager of *Law* is so called in contradistinction to Wager of *Battle*; but of this more hereafter.

* Hence the practice of attempting to drown witches. This is the Water Ordeal; and *witchcraft* was anciently, as now, a foremost crime of women!

Ordeal and Wager of Law were much the easier roads to acquittal under all accusations. One or both of these were included in the name of *Free Law*, in contradistinction to Jury and Battle. Though the church condemned the Ordeal*, its ministers were compelled to yield to it; and there are various grants by King John, to the bishops and clergy, to use the *Judicium Ferri, Aquæ, et Ignis*, which, to make the best of it, was only performed in the churches, or on other consecrated ground. The same King granted charters to several cities, securing to them, either trial by the ancient law generally, or by oath or *corsned*†, or by compurgation,

* “Cum sit contra præceptum Domini, Non tentabis Dominum Deum tuum.”

† The *Corsned*, or morsel of execration, was a mode of trial by the single oath of the party accused. The *Corsned* was a piece of bread or cheese, of about an ounce in weight, which the person swearing was made to swallow, first praying of the Almighty that it might cause convulsions, paleness, or find no passage, if he were guilty, &c. To this form, the Church added consecration of the morsel, and finally substituted the kissing of the Bible, with an appeal to God and the Saints. Blackstone remarks, that the remembrance of the custom still subsists in certain phrases of the common people; as, “I will take the sacrament upon it; may this morsel be my last, and the like.” The custom is natural, and therefore ancient; it is prescribed in the Mosaic law; and an example of its practice occurs in the New Testament, in the story of Ananias and Saphira. It exists among us at this day, but only in an inverted form. By the ancient practice, a single oath was conclu-

more particularly. Trial by Battle, and Trial by Jury, were the objects of aversion*. The Norman priests, who, though they were not

sive on the side of the *defendant*; in our modern Courts of Conscience, a single oath is conclusive on the side of the *plaintiff*.

* The reader sees the absurdity of supposing that either King John, or the other royal subscribers to the great Charters, were urged by the popular voice to make the Judgment of a man's Peers the only *law* of the land; when, in reality, the superstitious customs—and the reliance on purgation—and compurgation—were the darling *laws* of the people—were what they called their Free Law: in absolute opposition to Trials by Battle and by Jury, which were pressed upon them by their conquerors—were what, therefore, they prized, in the highest manner, as their *liberties*—and the continuance of which they were anxious to buy, to beg, and to seize, at the hands of the Sovereign—which individuals sought for themselves, and corporations for their communities! Of proofs of the latter proposition, from City charters, enough is seen in the text; and of proofs of that which went before, the subjoined is one example.

In Madox's History of the Exchequer, p. 296, we find "Walter de Burton paying ten Marks for *Free Law*, in an Appeal for Wounding." The Conqueror granted to the English, that if appealed by Frenchmen, they may have their choice either of Battle or of Ordeal; but it would have been no favour, in the estimation of those days, to substitute Trial by Jury:—"In the laws of William the first, it is decreed, that if a Frenchman Appeal an Englishman of Perjury, Murther, Theft, Man-slaughter or Robbery, '*Anglicus se defendat per quod melius voluerit; aut Judicio Ferri, aut Duello.*'" *Selden's Duello*, p. 12.

absolutely the first messengers of Christianity in England, found the Saxons pretty largely imbued with Paganism, brought with them the Canon Law, which declared Trial by Ordeal to be a fabrication of the Devil. The same law had so declared it, in Denmark, a century before ; but the Saxons were still but little disposed to part with it. Trial by Jury, as well as Trial by Battle, had certainly existed under certain forms, and to a certain extent, in England, under our Saxon and Danish kings ; but the Normans brought both into more frequent practice, and eagerly endeavoured to establish them in England, to the suppression of Compurgation, and still more to that of Trial by Ordeal. The people of England regarded this as a hardship ; and Magna Carta, so far from describing the Trial by Jury as “ the law of the land,” as is sometimes represented, has, I am persuaded, expressly intended to save to the people the concurrent existence of other modes of trial, particularly those of Compurgation and of the Judgment of God*.

* The words of Magna Carta are singularly strained, when they are made to say, that “ no freeman shall be *arrested, imprisoned, &c. &c.* except by the lawful Judgment of his Peers or *the* law of the land ;” and yet this is the construction given, not only by ignorant demagogues, but by the learned Blackstone. First, we are to observe, that the original Latin will bear no such grammatical construction ; and, secondly, that if it could, it would be at variance with a great part, as well of our ancient,

Henry I had before invested the citizens of London with the favourite privileges, as far as

as of our modern jurisprudence; that is, with our history, and with our practice.

First, of the grammatical construction. “Nullus liber homo capiatur, &c.” says Magna Carta, “nisi *per* legale judicium parium suorum, vel *per* legem terræ.” Now, the *two* concluding members of this sentence are most disingenuously or most illiterately forced, by the popular translators, into *one* member: “Unless declared to be forfeited,” says Blackstone, “by the Judgment of his Peers or the Law of the Land;” (Blackstone, iii, 23.) no notice being taken of the disjunctive *per*, “by”—“*by* the Judgment of his Peers, or *by* the Law of the Land.” But Blackstone is not undeceived, even by his own quotation from the Charter of the Emperor Conrad, which, according to him, contains the same words as Magna Carta, but which, in fact, affords a contrast, and not a similitude: “Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, *et per* judicium parium suorum;” that is, “No one shall lose his goods, but *according* to the customs [or laws] of our ancestors, and *by* the Judgment of his Peers.”

But as to our history and practice, it is in the first place certain, that, according to our practice, the subject is often arrested, imprisoned, and despoiled of his goods and liberty, though not of his life, without Judgment had by his Peers; and, secondly, as to our history, (as we shall presently have further occasion to see) the Judgment of Peers neither was our only mode of trial, or only *law* of the land; (for by “law,” *legem*, is meant mode of trial) nor is it true, though so asserted by Blackstone, that the Judgment of Peers “was ever esteemed, in all countries, a privilege of the highest beneficial nature.” That it was not anciently our only “law of the land,” or established or customary mode of trial, is plain from Blackstone himself,

the prerogative permitted: "None of the citizens of London," says this Royal Charter, "shall Wage Battle* ; and if any of the citizens shall

who expressly reckons up *seven* "species of trials in civil cases, and *five* in criminal cases ;" and which numbers, by some subdivisions, might be still further multiplied. "The species of trials in *civil cases* are seven. By Record ; by Inspection or Examination ; by Witnesses ; by Certificate ; by Wager of Battle ; by Wager of Law ; and by Jury." Commentaries, iii, 22. In criminal cases, Blackstone enumerates, 1. Ordeal of *two* kinds, and which, as we have seen, are *Aquam Legem*, or Water Law, and *Ignem Legem*, or Fire Law ; 2. Corsned, which is, in fact, the single oath of the party, or simple Purgation ; 3. Trial by Battle ; 4. The Trial of Peers of the Realm by their Peers ; 5. Trial by Jury. The Learned Commentator ought to have added, here, as in criminal trials—6. Wager of Law, or Compurgation.

The reader will not consider any observation contained in this note, or in other parts of these pages, as designed to detract from the real merits of Trial by Jury. In point of fact, a main branch of the Argument in hand refers to the support, in all its prerogatives, of that mode of trial ; for that THE VERDICT OF A JURY OUGHT TO BE HELD SACRED AND FINAL UPON ALL CRIMINAL QUESTIONS, is the very essence of our doctrine. But it is matter of history, at the same time, that Trial by Jury was *not* so highly esteemed by our ancestors as by ourselves ; and it belongs to our same Argument to show it to be matter of *law* and of *fact*, that Trial by Jury is not the *only* "law of the land."

* I quote from the English translation, 12mo. London. 1738. p. 3. To "wage Battle" is to give pledge of Battle, or to undertake to fight. The text, however, must mean, "shall not be *pledged*, that is, called upon, to fight ;" in other words,

be impleaded concerning *pleas of the crown*, the man of London shall discharge himself *by his oath**." Henry II, in a subsequent Charter, renewed the grant of these privileges, saying, that "none of the citizens of London shall Wage Battle; and, of the pleas of the crown, they may discharge themselves according to *the old usage of the city*." Richard II, in a third Charter, provides, "that none of them may wage Battle, (that is, none of them *be appealed*) and that they may discharge themselves of the pleas belonging to the Crown according to *the ancient custom of the city*." The Charters of John, or one of them, and several of the Charters of Henry III, to the same city of London, contain repetitions of these words; but one of the Charters of the last mentioned sovereign is remarkable for the introduction of words qualifying one of the privileges, and at the same time throwing light on the "ancient custom" of trial by oath of the party, and bring-

"SHALL NOT BE APPEALED;" for, in the time of Henry I, every Appeal was a pledge to fight.

* Thus the King granted, that as to pleas of the crown, as in suit of murder by inquest or on indictment, no "man of London" should be obliged to put himself on a Jury, or on "the country;" for Battle, when the suit was the King's, was out of the question. Whether the "oath" here intended is the single oath of the party, or *Corsned*, or *Compurgation* or *Wager of Law*, may be uncertain; but it was probably the latter.

ing to light a custom still more extraordinary, perhaps, than any which have been yet alluded to, and giving some explanation of the attachment to Free Law, and dislike of Trial by Battle and by Jury! The words are as follows: "We have also granted, &c., and that none of the said citizens may wage Battle; and that for the pleas belonging to the crown, (chiefly those which may chance within the said city and suburbs thereof) they may discharge themselves according to the ancient custom of the said city: this notwithstanding except, That upon the graves of the dead, for that which they [the dead] should have said, if they had lived, it shall not be lawful precisely to swear. But, instead and in place of those deceased, (which, before their deaths, to discharge those which for concerning the things, belonging to the crown, were called and received) there may other free and lawful men be chosen, which may do and accomplish that, without delay, which by the deceased should have been done, if he had lived*." Here, a man, standing upon the grave of a dead person, is allowed to swear to what that person, if alive, would have said! Such is one of our samples of Saxon customs, the ancient customs of our cities—and such is part of the explanation of the attachment of our ancestors to their Free Law—*Li-*

* Charters of the City of London, p. 25.

*beram Legem**. On every occasion, the Saxons preferred the *free law* of trusting to miracles, and to the oaths of the defendants themselves, who were only to swear themselves innocent of the crimes imputed to them, or to swear that they had paid the debts, or restored the goods, that were demanded of them—to the *bonds* of proof by witnesses—judgments by Juries—or the necessity of defending their oaths by their bodies ! It is on this principle that the citizens of London, and other cities in this kingdom, are exempted from battle, if appealed at the suit of the subject, and from pleading to indictments at the suit of the crown†—and may discharge themselves, in all criminal suits, by Compurgation, or Wager of Law. Thus, in the charter of the City of Dublin, granted by Prince John, afterward King, we read, “ That no Citizen shall wage Battle

* By the Charter of London, the favoured citizens are further made “ free and quit of Childwife ;” the same, says a Commentator, with Heirwite, or Lecherwite, *i. e.* money paid, or a punishment, for corrupting or getting a bond-maid with child.” *Charter of London*, p. 6.

† I mean to contend hereafter, that if the citizens of London, &c. are exempted from Trial by Battle, they are also exempted from Trial by Jury, in all pleas of the Crown, unless where a special provision shall be shown to have been made to the contrary. Whether citizens, who cannot, upon Appeals *against them*, be forced either upon Battle or upon a Jury, are entitled to appeal others, and oblige them to accept one of the two alternatives, is a separate and serious question.

(*faciat Duellum*) within the City, upon any Appeal that any person may bring against him, but shall purge himself by the oaths of forty lawful men of the said City* ;” a passage which throws further light on that contained and reiterated in the Charter of the City of London, because it explains what it is for the citizens to “ discharge themselves, of the pleas belonging to the crown according to the ancient custom of the city†.” It is remarkable, that the last express mention of the privilege in view, in the Charter of London, is in a charter of Henry III‡, and that it is there accompanied by a restriction upon the “ ancient customs of the city,” and, by the substitution, in the case described, of the verdict of a Jury, for the single oath of a party. This seems to corroborate the accounts

* “ Quod nullus Civis faciat Duellum in Civitate, de aliquo Appello quod quisquam versus eum facere possit, sed purgabit se per sacramentum 40 hominum ipsius Civitatis, qui legales sunt.”

† How they are to discharge themselves of Appeals is not expressed ; but, by analogy, it is here, also, by Wager of Law. It may deserve remark, that according to the words of the Dublin Charter, the privilege does not follow a citizen without the walls of the city. Thus, if a citizen of London is appealed or indicted in the county of Surry, he must go to Battle or to a Jury.

‡ The Charter of Charles II, (the latest London Charter) confirms all former grants, except as therein excepted ; and there is no exception as to this privilege.

given of the gradual disrepute into which Wager of Law and similar forms of proceeding fell among us: and, in the whole matter, we may perhaps discern how Trial by Ordeal, or the Judgment of God, came to be *incorporated* with Criminal Trial by Jury. The Norman conquest promoted Trial by Jury; it found in England Trial by Compurgation and Trial by Ordeal. All the Norman Kings of England are described as anxious to promote Trial by Jury*; the taste of their Norman subjects was for Trial by Battle†;

* We find William introducing Trial by Jury by his conquest, and his successors upholding it by their charters, though with a popular reservation in behalf of the ancient customs. Henry II introduced the Grand Assize upon questions of right. "This wise prince," says Henry, "was no friend to the superstitious modes of trial by fire and water ordeals, nor to the barbarous one by single combat, especially in civil causes. He therefore endeavoured to introduce trials by juries. With this view he made a law, allowing the defendant, in a plea of right, to support his title either by single combat, or by a grand assize," "which (says Glanvill) is a benefit granted to the people by the King's clemency, upon consultation with his Nobles, in tenderness of life, whereby men might decline the doubtful success of battle, and try the right to their freehold in the other way." "This was a great improvement in English jurisprudence, and from hence we may date the more frequent use of Juries than in former times." *Henry, Hist.* vol. iii. p. 368.

† While, as we have before seen, Madox's History of the Exchequer furnishes us with examples of fines paid to escape from Battle to Wager of Law, the same work shows other indi-

the taste of their English subjects was for Trials by Compurgation and by Ordeal; they were obliged to indulge both, as we see the proofs. Now, Trial by Ordeal is said to have been abolished *entirely* in our Courts of Justice by an Act of Parliament in 3 Henry III, according to Sir Edward Coke, or rather by an order of the King in Council*. It is, perhaps, plain, that it is not abolished “entirely,” even at this day. Some difficulty may even be opposed to this abolition, as well as that of Trial by Battle, by Magna Carta; for, if that instrument assures to the subject the Trial by his Peers, (*legale judicium parium suorum*) it also assures to him the other customary forms of trial (*legem terræ*) of the kingdom. Now, the Charter expressly contemplates

viduals preferring Battle to Ordeal: “The same King, (John) by Letters Patent, remitted to Nicholas de Savigny the *Legem Aquæ* which he was to have undergone: and granted to him the liberty of waging Duell within the King’s dominion of Normandy.” *Hist. Excheq.* p. 364.

* Blackstone, iv. 27.

† Where Magna Carta provides against certain abuses of the Wagers of Law and Battle, there also we find a confirmation of the good old doctrine, that Appeals or Challenges to Battle are not to be made without *first* convincing the Court that there are grounds for them: “Nullus ballivus de cætero ponat aliquem ad Legem Manifestam (that is, Wager of Battle) nec ad Juramentum (that is, Wager of Law) simplici loquela sua (that is, merely by Count or Declaration) sine testibus fidelibus ad hoc inductis.” *Blackstone’s Commentaries*, iii. 22.

by name the Trials by Battle and by Wager of Law, and ought, it must seem to be understood, to contemplate Trial by Ordeal also*. What then, if Henry III, (the act or ordinance of that Prince is lost) or if some other Norman King, contrived to merge the Trial by Ordeal, in criminal cases, in Trial by Jury? To be tried by Jury was originally to be tried *per pais*, that is, by "the country;" and the Trial by Ordeal (*per Dieu*); and here we have the trial *per Dieu et per pais*; "by God *and* the country." Thus, we seem to show, that in criminal cases, it is in the Trial by Jury, and not in the Trial by Battle, (as Robertson and so many others would persuade us) that we appeal to the Judgment of God; thus we throw back the charge of *impiety*, if there be any, from the Trial by Battle to the Trial by Jury; and thus we offer a new reason why Criminal Trials by Jury should be final: "The decision," says Robertson, (speaking erroneously of the Trial by Battle) "being considered as an appeal to God, ought to have been acquiesced in as final †."

* That Ordeal was part of the "law or custom of England," (*legem terræ*) before and at the time of the date of the Charter, admits of no question.

† While this sheet is going through the press, the newspapers supply, in the report of a trial at the Old Bailey, a warrant for the argument I have used, as to the manner in which, even by

47. Before parting, in this place, with the civic privilege, in relation to Battle, which we have incidentally been called upon to take notice of, a short digression, in relation to it, may be allowed. "Whatever was the motive," says a recent writer upon the subject, "for excusing citizens from the Judicial Combat, whether that from their pursuits they were less qualified for personal conflict, or that from the advantages their arts and industry afforded to the community, they were entitled to a greater share of favour than their fellow-subjects, it is plain, that the exemption was considered a valuable privilege; and there wants not many words to show, that in the present state of society, all the King's subjects are to be held equally unqualified by their pursuits to vindicate the murder of their relations with a cudgel, and all are equally entitled to a fair measure of justice." To these observations part of the very necessary answer has already been given. The motive for excusing Citizens

modern interpretation, the divine interposition may be considered as operating on the criminal verdict of a Jury. The case is a charge of rape, and Mr. Baron Garrow is described as charging "the Jury to tread with peculiar caution. For it was necessary by law that a single witness only should be adduced, and unless surrounding circumstances should, *under the protection of Providence*, intervene, it might be possible that a single witness might fix a capital punishment upon real innocence."

from the Judicial Combat, *when appealed against*, along with an equal excuse from Trial by Jury, when sued by the Crown, was that of gratifying them with the continuance of their ancient customs of Ordeal, Wager of Law, &c., which they called their *liberties*. Their “peculiar pursuits” was not the motive; all the subjects of the Kingdom would have obtained the same chartered rights, if they could have prayed, or purchased, or forced them, from the Crown; and the question at this day is, or ought to be, not whether all the King’s subjects ought to be admitted to the same privileges, but whether those privileges, so unequal in their operation, ought to remain to the freemen of any cities?

45. But trial by Battle is said to be *barbarous*. It is my argument, that the whole Law of Appeal is barbarous; but I hope, at the same time, to satisfy the reader, that Battle is not its *most* barbarous part. To attempt the defence of Trial by Battle, as a desirable resort of any system of jurisprudence, would be absurd; nor is it relevant to the present subject of discourse to inquire, what apologies are to be offered for its toleration, in the immaturity of social life*. It is quite enough

* Dr. Henry, in his History of Great Britain, treating of trials by Ordeal, Battle, &c. ventures the following very unfounded remark: “The great object which many nations of antiquity seem to have had in view in their criminal trials, was

to say, that Trial by Battle belongs to the law of the country only as a concomitant of the Law

not so much to preserve the innocent from being condemned, as to prevent the guilty from escaping condemnation. Therefore, when they could neither prove their guilt by witnesses, nor extort a confession by tortures, they applied to Heaven for evidence against them, and interrogated Omniscience by many different rites." *Hist. Great Britain*, vol. I, p. 221. Blackstone, on the contrary, attributes the barbarous and superstitious modes of trial in ancient use to the directly opposite design, and that which we may be assured is the true one: "They therefore invented a considerable number of methods of purgation or trial, *to preserve innocence from the danger of false witnesses*, and in consequence of a notion that God would interpose, miraculously, *to save the guiltless*." From a similar dread of committing injustice, they left the decision of doubtful questions, at issue between man and man, to the fate of Battle. If diffidence and self-suspicion be marks of barbarism, and if presumption be characteristic of mental refinement, then, but not otherwise, our ancestors were more barbarous, in relation to legal judgments, than we are; but the truth is, we must be very mindful to escape a certain "smooth barbarity" for genuine moral polish. In point of fact, Trial by Jury, with all its great and unequalled advantages, is attended with one inconvenience, against which it is very fit we should be upon our guard. Blackstone somewhere speaks of our "almost idolatrous attachment to it;" and he is himself somewhat given to the idolatry of which he speaks. Bacon, in the mean time, teaches us to have no *idols* whatever. When Blackstone calls the institution of Juries an "admirable criterion of truth," he is perfectly right, if, speaking as a lawyer, he means no more than it is an "admirable criterion" by which to determine all legal issues. But if it means, or can be thought to mean, that the verdict of a Jury, whether upon matters of *reasoning*, or

of Appeals ; and that therefore, if it gives offence, it is easily removed, simply by abolishing Ap-

upon matters of *fact*, is necessarily THE TRUTH, he is instrumental, with or without intention, in setting up a frightful and bestial idolatry. Before Juries can deserve such a worship, we must transfer to them that infallibility which we so strenuously deny to the successors of Saint Peter.

The inconvenience attending Trial by Jury is this ; that whereas, from the popular disposition to examine with rigour all the proceedings of “ those that are set in authority,” the decisions of Judges are every where exposed to the severest scrutiny ; while, from the nature of the institution of Juries, the popular favour is largely extended to it, and thus a just criticism is lulled asleep. Again, the most reasonable mind will hope for a sentence more certainly accurate from twelve men than from one. The strong prejudices which, in the progress of every inquiry, every individual is liable to take up, are met, in a congregation of twelve, by the prejudices, equally strong, of fellow-observers ; and there is ground for hoping, that in the collision of views, which is so likely to follow, truth will be struck out. Yet all this is frequently fallacious. In practice, if Juries will often come to better decisions than Judges,—Judges, on the other hand, will sometimes come to better decisions than Juries. The mischief is, that by our confidence in Trial by Jury, we are robbed of that distrust in the decisions pronounced between man and man, which is so becoming the imperfection of our means of inquiry, and in the exhibition of which our ancestors really appear to more advantage than ourselves.

We speak of the “ uncertainty of the law,” but there is an equal uncertainty of justice. It is one of the silliest of common-places, to say, that an innocent man can never be afraid to abide the issue of a trial. An eminent person in France, with more wisdom, declared, that if he were accused of carry-

peals, or, (what is the same thing) by defeating their operation, in the manner hereafter to be pointed out.

ing away the great bell of Nôtre Dame in his brecches pocket, he would fly, if he could, rather than take the risk of a trial. All persons conversant with the real history of our Jury trials are able to tell us innumerable anecdotes of guilt and innocence which have been made to appear in their opposite colours to the eyes of the most discerning Juries.

Paley has said, that circumstantial evidence is often more satisfactory than positive; or, in other words, that the proofs to be collected from circumstances are frequently better entitled to confidence than the direct declarations of witnesses. This is true; and yet it proves nothing but the lamentable uncertainty of *all* human testimony. Witnesses may deceive us; and by drawing our conclusions from circumstances, we may deceive ourselves.

In dismissing this subject, let us remark, that amid the barbarism which we discover in the judicial proceedings of past ages, there is perhaps one view to be taken, which is of a more inviting character. When we observe in them so much anxiety to avoid the dangers that result from testimony, and contrast it with the unhesitating confidence with which we look on modern decisions, we may be disposed, perhaps, for a moment, to think that the superiority is on our own side. We may think, that the precautions of our ancestors grew out of their knowledge of a prevalent want of veracity in their contemporaries; and we may fancy that our own persuasion of security is founded in the moral improvement of our day. Let us not be misled. Truth is the virtue of the savage, and not of the citizen; a plant that grows spontaneously in the forest, but is raised and preserved with difficulty in gardens. It would be infatuation not to believe, that Trial by Battle, and the endless lawful duels of ancient Europe, were

46. The *legality* of Trial by Battle is without question. It was formerly part of the law of the land, and it still remains such. "Trial by Battle," says Hume, "was never abolished by law in England." The question of abolition appears to have been repeatedly agitated in Parliament, between the years 1620 and 1641, and to have been always lost*. Battles were fought (as has been

favourable to veracity of speech. It would be infatuation not to believe, that the ancient practice of Trial by Compurgators owed its popularity to the prevalence of truth of speech in society, and that its decline and disrepute is to be attributed to the decline of virtue. It is one of the many practices which subsist without reproach in a rude state of society, but which become hideous as simplicity of manners disappears. The ancestors of whom we speak possessed the *prisca fides*. "To speak truth, and draw the bow," was the education of a Spartan; and what other than this could be the education of our own precursors, when every man, in every condition of life, was bound to "defend by his body" whatever he uttered with his tongue! Courage and truth must have been the first and the last instilments of his moral education. What must have been a people so educated, and an age which saw such an education? The age of chivalry, then, is not a fable: and there are aspects in which the *barbarism* of our ancestors has a share of beauty which we must never cease to emulate.

* The following are notes of Parliamentary proceedings, in relation to Trial by Battle, between 1620 and 1641.

"An Act for abolishing of Trial by Battle or Combat. Bill read." *Journals of the House of Commons, Feb. 28, 1620.*

"Battle: Committed to Mr. Noy, Sir E. Mountague, &c. Presently, in the Committee Chamber." *Ibid. March 13, 1620.*

seen at page 104, note) in 1631 and 1638*. I have endeavoured, without success, to find the

“ Mr. Noye reporteth the Bill for Battle. The Bill to be re-committed; and counsel to be heard before the committee, on both parts.” *Ibid. March 13, 1620.*

“ *Hodie* the Earl Marshal reported the Bill, An Act to abolish all Trials by Battail, and joining of issue by Battail, in all Writs of Right, as fit to pass, with some amendments; the which amendments were presently twice read, and the Bill ordered to be ingrossed accordingly.” *Journals of the House of Lords, March 19, 1623.*

“ Mr. Solicitor reporteth the Bill of Battle, That the committee thinketh it not fit it should proceed; but rest to be advised of.” *Journals of the House of Commons, May 29, 1623.*

“ A message from the Lords, by Attorney and Mr. Serjeant Crooke:—An Act to abolish all Trials by Battle:—committed to Sir Edward Coke, Mr. Noy, Sir William Fleetwood, all the lawyers of the House, and soldiers.” *Ibid. March 22, 1623.*

In 1629, a Bill was brought into Parliament to abolish the Battle in writs of right, and was read twice.

“ *Vice lecta est Billa*, An Act to abolish all Trials by Battaille.” *Journals of the House of Commons, Feb. 25, 1640.*

“ *Vice lecta est Billa*, An Act to abolish all Trials by Battaille; upon Question, committed unto Sir H. Anderson, &c.” *Ibid. March 11, 1640.*

“ Ordered, That the Petition of Richard Lilbourne, gentleman, this day preferred to this House, shall be referred to the consideration of the committee for the Bill for Abolishing of Trial by Battaille, to be considered of when the committee shall be revived.” *Ibid. July 23, 1641.*

* In the year 1632, an anonymous writer put forth “Anti-Duello; or, a Treatise in which is discussed the lawfulness and unlawfulness of Single Combats, &c. London. Small 4to.

arguments employed on either side, in Parliament; but I submit, that on the basis of the

1632."p. 62. "A discourse wherein is discussed this question, whether a Christian magistrate may *grant a Duell*, for deciding of the matter, *when the true author of some fact committed cannot be discovered.*" This tract, though intended to decry Battle, has an engraved frontispiece *ad captandum*, in which is represented two knights, armed and mounted, over whose heads is the motto "*Conquerir ou Mourir*," while beneath are the following lines :

"Lo, in this portraicture, the wonted guize
Of warlike English in forepassed tymes;
When matters were not put to comprmise,
But, by the sword to judge of doubtful crimes,
Valour decided the cause, and hee
Gain'd honour, which obtain'd the victorie:
The conquered, if he were not slaine in fiede,
Was doomed by course of lawe his life to yeeld."

The "lawfulness" which the writer discusses is that which is to be judged of by reason and scripture, and not that which relates to the law of the land. In accordance with the argument hinted at in a preceding note, the controversialist finds an excuse for this and other barbarous modes of trial, in the strong sentiment which was anciently felt, of the difficulty of pronouncing sentence in doubtful cases, and alludes to instances on record, where, "if the proceeding was barbarous, the judgment was commendable." Rejecting, nevertheless, all pleas of this description, he concludes with a condemnation of Battle, that is, of *Appeals*, in terms which afford no unfair specimen of his style, both of expression and illustration :

"Be it as it will, of all expedients one can take, the Duell is the worse. This way is practised by men barbarous and unnatural; it is casual and deceitful; it profanes the sacredness

construction which I have given (page 120, note) to Magna Carta, a legislative abolition of Trial

of justice; it overthrows universal maxims; it produceth no certainty; it puts in jeopardy the innocent as well as the guilty; it tempts God many ways; it makes men slayers of their neighbours and themselves; it cozens men of salvation, and carries their souls to the gates of hell: it is condemned by the wiser part of Christians; it is not warranted by the law of God; it is without example from the practise of the faithful. To conclude, it is a poysonous antidote, more pernicious than the mischief which one would prevent; and when it produceth the fruit desired, it is a wretched fruit must be purchased at such a price. David, in his sicknesse, earnestly desiring to drinke of the wels of Bethlehem, too souldiers would have hazarded their lives to fetch some: he protested he would not drinke the blood of those men." p. 45.

Canvassing the point of difficult decisions, the writer refers to the old Grecian anecdote of "a Judge, that not being able to give his resolution in a capital matter, and fearing to do wrong to the one or the other, would not give a definitive sentence, but decreed, that the parties should appear within a hundred years, to abide what was right;" and proceeds, "If the question bee then of fact, which cannot be proved in any ordinary way, what shall the Judges do, to find out the truth? We have not Moses resident on the earth, who could consult with God himselfe, when he knew not to whom the right of a controverted succession belonged; nor the pectorall of judgment upon the habit of the great sacrificer: nor the water of malediction, which discovered the guilt or innocence of women suspected of adultery; nor the eie of seers or prophets, who gave answer themselves concerning smaller matters; as Saul, searching his father's asses, went to Samuel to hear some tidings of them: nor that spirit by which Elizeus discovered the avarice of Gehazi, and Saint Peter the lying of Ananias and Saphira.

by Battle would be an inroad upon the liberties of the subject. If the Charter protects Trial by Jury, it also protects Trial by Battle*.

“I will not speak at all of those unlawful ways which *many have late held* to attain thereunto. No man would think of bringing into use the proof by scalding water, wherein the Livonians put the hand of the accused partie; or the iron red hot, upon which one of the greatest Princesses of Europe offered to march naked, for testification of her chastitie; or the profanation of those who abuse the sacrament of the Eucharist, to know if a man be innocent, and give it him in this manner: ‘The body of our Lord Jesus Christ inable thee to prove.’ More tolerable was that course which a Judge tooke, to end a controversy betwixt three brethren, who were at variance which of them was the more legitimate: he caused the body of their dead father to be unburied, gave them in their hands bowes and arrowes, and adjudged that hee of the three that shot nearest his heart should be held legitimate; two shot; the third said, that he had a great deal rather forgoe his title, than to gaine it at such a price; the succession was adjudged to the last; and if the proceeding were barbarous, the judgement was commendable.” p. 6.

The subjoined paragraph may be added to these extracts, because it will remind the reader of one or more recent instances, particularly one at New York, in North America, “It hath been seene, that two men have so simmetrically resembled each other, that all the kindred of the one, and his very wife also, being mistaken, hath entertained the imposter into a place where he had no interest, and yet when the true husband hath come and presented himself, the subtilties of the other were so quaint, and his answers so pat and conformable, that they have made the Judges stand astonisht.” p. 7.

* It has been seen above, that Magna Carta secures to the subject the administration of justice *per legem terræ*; and that

47. But if Trial by Battle is neither *impious*, nor *exclusively barbarous*, nor *illegal*, one heavy charge is thought to be seriously fixed upon it; namely, that it is *Norman*. Blackstone, in enumerating the alterations that were incident to the Norman Conquest, has most unadvisedly said, “The ancient Trial by Jury gave way to the impious decision by Battel;” and a lucky writer of the day has discovered, that “Wager of Battel was at first (as it has been lately) resorted to for the destruction of the remedy by Appeal, and that the early Norman Judges, besides the introduction of Battle, were ingenious in contrivances otherwise to limit the operation of Appeal.” Let us answer, to these misrepresentations—grounding ourselves, in great part, upon what has appeared above:—

1°. That Appeal never anciently subsisted without Battle;

among the most valued parts of the law of the land, at the date of the Charter, were the trials by Ordeal, by Wager of Law, and by Wager of Battle. In the same spirit, a statute of Henry IV declares, “Item, For many great inconveniences and mischiefs that often have happened by many Appeals made within the Realm of England before this time: it is ordained and stablished from henceforth, That all the Appeals to be made of things done within the Realm, shall be tried and determined by the good laws of the Realm, made and used in the King’s noble progenitors.”

2°. That Battle did not originate, in this kingdom, with the Normans ;

3°. That Trial by Jury was but little in use among our Saxon ancestors ;

4°. That Trial by Jury was established in Normandy before the Conquest, and was anxiously promoted, and finally established, in England, by the Norman kings ;

5°. That the Norman Judges, as they did not “ introduce Battle,” so, also, they were not “ ingenious in contriving otherwise to limit the operation of Appeal.”

6°. That the Norman code brought into, or rather confirmed, in this kingdom, the Law of Appeal in its utmost plenitude ; and that the limitations which have been given to it are solely of English growth, and in all instances the work of the English Parliament.

7°. That as to the Judges of our Courts of Law, their part has rather been to contravene, as far as they were able, the policy of the Parliament, *and extend the operation of Appeal* ; since, while the Parliament (as we have before seen) has been employed in limiting the *occasions* and the *right* of Appeal, the Judges have lent them-

selves with zeal to the detestable task, of applying the few remnants of a law, which has become useless and mischievous by change of circumstances, to the atrocious, and (shall we call it) *impious*, purpose, of bringing to a second trial, men who have been already acquitted by "God and the country."

48. It is unfortunate for those who would array Battle in a purely Norman guise, that they inadvertently bring it forward with many a Saxon trapping still attached to its vestments, and also that there are such things as traces of the Saxon times still remaining among us. Battle is of German and still more northern origin*. Germany introduced Battle into France and into England. Germany gave the Burgundians to France, and the Saxons to England. The first Battle, or Judicial Combat, which occurs in our history, was fought, in the year 1016, by Edmund, the West Saxon, with Canute, the king of Denmark, for the possession of the crown of England; and it was fought as a trial of the right of land, as between two territorial claimants, as in our writs of right. The royal combatants growing weary, came to a compromise, and

* "We derive Appeals," says Barrington, "from the Germans: *Suscipere enim tam inimicitias seu patris, seu propinqui, quam amicitias necesse fuit.*" *Tacit. Mor. Germ.*

parted the land between them.—The word *craven*, which occurs in the history and regulations of Battle, and is equivalent with the French “recreant,” (*recriant*) is Saxon*. He that *cra-*

* Blackstone (iii, 22) calls *craven* “a word of disgrace and obloquy, rather than of any determinate meaning.”

I am indebted to a friend deeply read in Anglo-Saxon philological antiquities, for the following remarks:

“The ‘horrible word *craven*,’ instead of having ‘no determinate meaning,’ is a very good and intelligible word, and highly appropriate for the occasion on which it was employed. It is genuine Anglo-Saxon: *Cræfian*, (*craſian*) which means *to crave*, in modern English; and is the legitimate descendant of the Anglo-Saxon *cræfian*, ‘to crave,’ ‘to beg,’ or ‘to implore.’ The termination *n*, in *craven*, would appear to give it a participial meaning; but I believe, from many analogous instances, that *to craven* was the old word. Mr. Horne Tooke, in the second volume of his *Επεα Πτεροεντα*, (page 71) however, is inclined to make it a participle: he says, ‘*Craven* is one who has *craved* or *craven* his life from his antagonist—*dextramque precantem protendens*.’ The word is used in the Saxon Chronicles, and also in the Laws of Canute. If you possess (which I now do not) Wilkins’s *Leges Anglo-Saxonicae*, you may turn to the passage. The word *recreant* being employed with *craven*, gives an additional elucidation of the meaning of the latter; it is from the French “recriant,” *crying out*, (for mercy, understood,): it has now the meaning of dastardly, cowardly; and is happily employed by Lady Constance, to Austria:—

‘Go, doff thy lion’s hide,

And hang a calf-skin on those *recreant* limbs.’”

Craven, may be from the same root as *coward*, and have the same meaning. Wilkin’s affords us the following hints:

vened, or yielded, in the Battle; lost, according to the Saxons, his Free Law, (*liberam legem*) that is, the legal rights and privileges of his free condition. From the Saxon *Lempa*, *Lempan*, (*kemp*, *chemp*, or *champ*, *champan*) we have the modern word *Champion*. The Judicial Combat was called *Camp* or *Kemp-fight* by the Saxons; and, according to some, the very word *Combat*, (French) is from the Saxon *Camp-fight*, a battle of champions, or fighters man to man; *duellists*, or fighters of a battle between two persons; *duo bellum*, combat, or camp-fight. Further, the Norman lawyers are disposed to treat England as the source of their customs, instead of deducing the English customs from their own; so, that while we call Battle Norman, they call Battle English or Saxon*.”

49. The probability is, that there was little or no *radical* difference between the Saxon and Norman institutions; but more or less difference in the existing practices†. Battle and Jury were

“ *Cravare, cravatio, cravatus*. Sic nimirum quod in Legibus Henr. 1, et in antiqua L. L. Saxonicarum, versione apud Jornalensem, quandoque *gravatus*, quandoque *curvatus*, quandoque *curvatio* legitur corrigendum reor.” *Wilkins's Leges Anglo-Saxonicae*.

* See M. d'Alençon's preface to the Grand Coustumier.

† The Normans were in a much higher state of civilization than the Saxons; a circumstance which possibly accounts for

alike known to the Normans and the Saxons; but the Normans were fond of Battle, and the Saxons of Compurgation and Ordeal; and Juries were in still less favour with the Saxons, than even with the Normans*. Dr. Henry tells us,

the conquest. Among the proofs, is the existence of the *were-gild*, or compensation for murder, in the laws of the Saxons—a relic, as has been said above, of the first stages of society—and of which we find no traces in the Norman code. The life, and not the money of the offender, is sought under the Norman laws; and a preference for the money, among the Saxons, was, perhaps, the reason of the lesser frequency of Battle (if it was so) among that people.

* “ Trials, among a people [the Saxons] who had a very strong tincture of superstition, were permitted to be by Ordeal,—by the Corsned, or morsel of execration,—or by Wager of Law, with compurgators, if the party chose it;—but *frequently* they were also by Jury; for, whether or no their Juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable *criterion of truth*, and most important guardian of public and private liberty, we owe to our Saxon ancestors.” *Blackstone*, iv, 33, i.

“ The trial of criminal and civil causes, by a Jury of twelve men, which makes so distinguished a figure in English jurisprudence, seems to have been introduced in the reign of William I, and was probably one of those customs which he had seen observed in his native country, and which he wished to see observed in England. For this custom had prevailed in Scandinavia in very remote ages, was brought from thence into that part of France which was possessed by Rollo and his followers, and from them called Normandy, where it was preserved till it was imported into England at the conquest. This custom was not established at once by any positive statute, but came into

that Battle was “not *much* used in England till after the Conquest*.”

50. The sum is, that either Appeals have had no ancient existence without Battle; or, that when they existed without Battle, they did not contemplate the *death*, or capital punishment, of the offender. If Blackstone is right in his conjecture, that modern Appeals are deducible from the ancient process for enforcing payment of the fine or *weregild*, then it would be obvious that their conversion into processes for reaching the *life* of the offender is a grievous abuse. Appeal is either a *civil* suit, or it is not. “But I will not contend,” (said Sir George Savile, in the course of a debate in the House of Commons)—“I will not contend that to be a *civil* suit, which ends in *hanging*†.” In truth, if the *weregild* was the thing sought by

use by slow degrees, and was far from being common in the former part of this period, when almost all causes were tried by ordeals of one kind or other. But in the reign of Henry II, after a law was made allowing the defendant, in a criminal or civil process, to defend his innocence, or his right, either by battle, or by a jury of twelve men, called the *grand assize*, this last method, as being the most rational, became more and more frequent, till at length it obtained a compleat victory over the Judicial Combat, and every other Ordeal. This victory, however, was not obtained till long after the conclusion of this period.” *Henry*, vol. III, page 355.

* Idem, vol. II, p. 304.

† See Appendix.

Appeal, the probability is, that where the weregild could not be paid, the murderer was—not put to death—but sold into slavery. We cannot imagine for a moment, that the Appellor was permitted to apply to the Court as a Shylock, and demand either his money, or his pound of flesh. Blackstone, in contrasting the Saxon and Norman institutions, recites, as characteristic of the former, “the great paucity of capital punishments for the first offence; even the most notorious offenders being allowed to commute it for a fine or weregild, or, in default of payment, perpetual bondage; to which our benefit of clergy has now, in some measure, succeeded*,” Thus the friends of Appeal may have it which way they will; either without Battle, or without punishment of Death: but they shall not have it Saxon, to get rid of the Battle, and yet Nor-

* Blackstone, iv, 33. With respect to the suggestion, that “our benefit of clergy has in some measure succeeded, &c.,” the Learned Commentator is possibly in error, in more respects than one; and here, again, we find the bias, to look for our institutions in Saxon rather than Norman originals. The benefit of clergy, with the *burning in the hand*, has a remarkable coincidence with the power lodged in the lord “*de faire coper le poing destre*” of an homicide; for this punishment was inflicted, precisely as in our burning in the hand for manslaughter, in the case “*que un ome tue un autre autrement que en murtre*,” and not, as in that suggested by Blackstone, of the *first offence* of even the most notorious offenders.” See *Assises de Jerusalem*, ch. xciv.

man, to carry the Appellee to the gallows! If, under the Saxon laws, the Appellee had not the right of protecting himself by Battle, he was also free, under the same laws, from the danger of forfeiting his life under a judgment of guilty. The friends of Appeal may therefore have it as they will; either without Battle, or without Death. Blackstone's suggestion, that the Appeal was originally a process for recovering the *weregild*, or compensation to be paid by the murderer, is an idea which even seems to be supported by the prevalent notion, that an Appellor may lawfully compound with an Appellee; though, in all other cases, a composition for felony is an act not to be mentioned without reprobation, and even a cognizable offence*. But what if we have confounded two things essentially different from each other; the punishment of murder by fine or slavery, and its punishment by *death*; the one sought by civil process, the other sought by Battle? Under the Law of Appeal, (as it will probably be found,) there is no notion of mulct or compensation; but the Appellant either acquits himself by his victory, or he is slain by his adversary, or he is hung by the

* "There never was an instance wherein the Trial by Appeal was instituted, that it was not for the sake of obtaining a sum of money." *Mr. Stanley. Parliamentary Debates.* See Appendix.

executioner. Here, as elsewhere, the modern practice appears to be a miserable hotch-potch of broken and disjointed pieces.—“The right of a vindictive action for the death of an ancestor, by his representative, (says a writer in one of the newspapers) is purely *Saxon*; and all the efforts of *Norman* Kings and *Norman* Judges, which have been directed to the Appeal, have been made for its destruction. It was the *Norman* dynasty which introduced the Wager of Battel into England; and, before the conquest, this barbarous, absurd, and unchristian ceremony was no more admissible, in case of an Appeal, than in a trial of the right of land by writ of right—into which also these rude soldiers received the judgment of Combat.” Let all this be proved, before it passes for any thing; and especially let it be proved, that the “*vindictive* action” afforded by the *Saxon* law, if it was not an Appeal to Battle, was an Appeal that affected the *life* of the offender. Let it also be further proved, that in the opinion of any enlightened person, any *vindictive* action, in any criminal case, is *now* held to be admissible*.

* So far is modern legislation from tolerating the principle of a “*vindictive*” criminal action on the part of the subject, that it rejects all interference whatever, of private parties, between the criminal and the public. “Nay,” says Blackstone, “the voluntary forgiveness of the party injured ought not, in true policy, to intercept the stroke of justice.” And “the

51. But we have insisted,

1°. That the Normans were not the authors of Trial by Battle; and,

2°. That they were not the authors of the modern restrictions on the right of Appeal.

The latter of these two positions alone remains now to be defended; and, for this purpose, let us observe in what state the right of Appeal came down to us through the medium of the Norman code. We have just seen (page 142, note) in what plenitude it subsisted among the Germans, and we need not doubt that the same is a true picture of its state among the Saxons. The text of the *Grand Coustumier de Normendie* implies an equal latitude; but the comprehensiveness of its import will be best understood from the more copious terms of the *Assises de Jerusalem*. In the eighty-second chapter of that work is enumerated “ what persons may bring Appeals of Murder, and to whom the defendant is bound to answer;” and the list descends, from *husband* and wife, and every family relationship, to the

right of punishing,” says Beccaria, “ belongs not to any one individual in particular, but to society in general, or to the sovereign who represents that society; and a man may renounce his own portion of their right, but he cannot give up that of others.”

woman who has nursed a murdered man, to the man who has nursed a murdered woman, to all a man's fellow-countrymen, to all who were joined with him by community of faith, to any one who had sailed with him on ship-board, and to any one who had been in his company *within a year and a day* before the murder, and could thence call himself his *companion**. The original is too curious to be omitted :

“ Feme Espouse dou Murtri.

“ Hom Espous de la Murtrie.

“ Tous Pareus & Parentes de Sanguinité.

“ Tous Pareus & Parentes d'Affinité.

“ Tous Parains.

“ Tous Maraines.

“ Tous Fillous.

“ Tous Filleures.

“ Tous Comperes.

“ Tous Comeres.

“ Tous ceaus & celles qui sont dou Pais dou Murtri, se il est Pelerin estrange.

“ Tous ceaus & toutes celles qui vindrent au passage a que il vint, se il est d'outre mer.

“ Tous ceaus & toutes celles qui ont esté avec le Murtri ou la Murtrie an & jour, si com est devant dit.

“ Tous ceaus ou celles qui sont tenus de foi au Meurtri ou à la Murtrie, soit Home ou Feme, ou Seignor ou Dame.

“ Tous ceaus ou celles qui sont dou commun dou Murtri ou de la Murtrie, se il est de costume.

* See the Grand Coustumier de Normendie.

“ Tous ceaus ou celles qui sont de la frerie dou Murtri ou de la Murtrie, se il est de la frerie.

“ Feme, se elle a esté soignant dou Murtri.

“ Home, se il a tenue la Murtrie à soignante.

“ Mais Feme qui ait Baron ne peut faire apeau de Murtre ne par l'otroi de son Baron ; & por ce le peut tel maniere de gens appeller & autres non, que il est bien semblant que amour les meine, à ce que il font l'Apeau pour l'amour qui a esté entre eaus & le Murtri ou la Murtrie, & non pour haine ou pour lover, ou pour malice*.”

* “ The reason,” says Mr. Barrington, “ of the *confining this right to relations*, appears by the following passage from the Assises of Jerusalem : “ Et mout de meaux en pouroit on faire, si chascun qui seroit fort et grand, pouroit devenir champion. Cap. xcii.”—But the learned author has here fallen into a mistake. The Assises does not confine the right of Appeal to relations, and the passage itself is misquoted. The real words are as follows :—“ Et je cuit que la Court doit esgarder que il ne se doit à li aerdre, se il n'a prové si com il doit que il est parent dou murtri, *ou ataignant à lui d'aucune des manières devant devisées*, que se enci n'estoit chascun et chascune poroit faire Apeau de Murtre, laquelle chose seroit mout desconvenable, et mout de maus en poroit l'on faire, que chascune home que seroit grant et fort, ou que seroit champion affecté, poroit parce remubier mout de gens, se il voloit faire aporloit un cors en Court qui eust eos, et se clamast d'aucune riche home, ou d'aucun qui eust parens ou amis riches ; et se enci estoit, que chascun peust appeller dou murtre, ceaus et celles qui font Apeau de Murtre, et gagent Battaille par champion, feroit mout que faus de faire l'Apeau, et d'estre en peril d'estre justiciés se lor champion estoit vaincu, puisque le champion le poroit faire, ou autre que les parens ou la parente dou murtri, puisque il poroit avoir pour monoie home que fist l'Apeau, & les getast en peril, et d'estre justiciés se le cham-

The truth of the matter is, That on the one hand, under the Norman system, and before it received alterations in England, the right of Appeal was almost without limit. BUT, on the other, there was NO APPEAL WITHOUT BATTLE; the few Appellants who were excused from Battle in person, being obliged to fight by their Champions, and to be answerable for all defalcations.—AN APPEAL IS A PROSECUTION BY WAGER OF BATTLE.

52. Why the King and Parliament of *England* have progressively restricted the right of Appeal has been argued above, already. It is sufficient, in this place, to recollect, that independently of the endless evils attendant on the practice, it is essentially vicious in principle—in this respect, if in no other—that it substitutes a private pro-

pion estoit vaincu.” M. Barrington is so far right, as that the passage corroborates every other account of the mischief attendant upon Appeals; since it informs us, that robust and desperate ruffians were in the practice of appealing wealthy persons, or those who had rich relations or friends, upon charges of pretended murders, supported by the production of wounded bodies, and by their oaths of relationship, *or such connection as the law allowed*; and that if these pretended champions were met by *hired* adversaries, on the part of the wealthy persons falsely accused, (instead of submitting to buy off the accusation with money) those *hired* champions might purposely commit an act of recreancy, and thus cause their principal to be hanged (*justicié*.)

secution for a public prosecution—and is in hostility with the first requisites of civil society. It has been seen, that it began when *public justice* was unknown, and that its continuance, after the establishment of *public justice*, is defensible upon no ground whatever. The principle, that the sovereign ought to wait for the private prosecution, before he commenced the public one, belonged only to the first struggles of civilization with the savage state;—the principle, that private persons might compel an accused person to defend his innocence by Battle, in cases where there was no evidence sufficient for a public prosecution, was barbarous, as all reasoners allow;—and the principle, that an accused person, being acquitted on the public prosecution, is still to be liable to a private prosecution—the principle of a *second criminal trial*—was reserved for the barbarism of modern ignorance, modern oblivion of the original intention and practice, and modern superficialness in regard to abstract notions.

53. Another objection which is offered to the allowance of Trial by Battle in Appeals of Felony, but of which it is scarcely worth while to take notice, is founded on its long *disuse* *. Few

* Only three examples of Wager of Battle, in Appeals of Murder, are said to be on record, in the ordinary law books. The last was in the year 1612, Egerton v. Morgan; “but Lord

readers can need to be reminded that law is not the less law for its disuse, and that its ex-

Chief Justice Dyer," says a writer, "tells the story confusedly and imperfectly. One thing, however, is clear, that the Battle was not actually fought; 'for an error or scrape being made in the plea, the bill was frustrated.' It is not stated that this was an Appeal of Murder *after acquittal*, and, indeed, it would seem, from the expressions of Dyer, that it was not."

Wagers of Battle, in Appeals of Felony, in Writs of Right, and in the Court of Chivalry, are of more recent occurrence, and were, doubtlessly, at all times, more frequent—murder being, happily, among the rarest of crimes. The circumstances, in *Low v. Kyme*, 1571, are thus imperfectly related by Stow :

"The 18th June, in Trinity Terme, there was a Combate appointed to have been fought for a certain manour and demaine lands belonging thereunto, in the Isle of Harty, adjoyning to the Isle of Sheppey, in Kent. Simon Low and John Kyme were plaintifes, and had brought a writ of right against T. Paramore, who offered to defend his right by Battell, whereupon the plaintifes aforesaid accepted to answere his chalenge, offering likewise to defend their right to the same manour and lands, and to prove by Battell that Paramore had no right, nor no good title, to have the same.

"Hereupon the said Tho. Paramore brought before the Judges, at the Comon Pleas at Westminster, one George Thorne, a bigge, broad, strong-set fellow : and the plaintifes brought Hen. Nailor, master of defence, and servant to the Right Honourable the Earle of Leicester, a proper slender man, and not so tall as the other. Thorne cast downe a gauntlet, which Nailor tooke up. Upon the Sondag before the Battell should be tried on the next morrow, the matter was stayed, and the parties agreed, that Paramore, being in possession, should have the land, and was bound in 500 pound to consider the plaintife's claim, as upon hearing the matter the Judges should award.

istence, and consequently the subject's right to avail himself of its benefits, can be terminated

The Q. Majesty was the taker up of the matter in this wise. It was thought good, that for Paramore's assurance, the order should be kept touching the Combat, and that the plaintifes, Low and Kyme, should make default of appearance; but that yet such as were sureties of Nailor, their champions appearance, should bring him in, and likewise those that were sureties for Thorne, should bring in the same Thorne in discharge of their bond, and that the Court should sit in Tuthill-fields, where was prepared one plot of ground, one and twenty yardes square, double railed for the Combate, without the West square, a stage being set up for the Judges, representing the Court of Common Pleas. All the compasse without the lists was set with scaffolds, one above another, for people to stand and behold. There were behinde the square, where the Judges sate, two tents, the one for Nailor, the other for Thorne. Thorne was there in the morning timely. Nailor, about seven of the clocke, came through London, apparreiled in a doublet and *galey-gascoigne* breeches, all of crimson sattin cut and raied, a hat of black velvet, with a red feather and band, before him drums and fifes playing. The gauntlet, that was cast downe by George Thorne, was borne before the said Nailor, upon a sword's point, and his batten (a staffe of an ell long, made taper-wise, tipt with horne,) with his shield of hard leather, was borne after him by Askam, a yeoman of the Queene's gard. He came into the Pallace of Westminster, and staying not long before the hall doore, came backe into the King's streete, and so along through the Sanctuary, and Tuthill streete, into the field, where he stayed till past nine of the clocke, and then Sir Jerome Bowes brought him to his tent; Thorne being in the tent with Sir Henry Chieney long before. About ten of the clocke, the Court of Common Pleas removed, and came to the place prepared. When the Lord Chiefe Justice, with two other

only by its solemn abrogation. Under these circumstances, the language of Counsel, on a late

his associates, were set, then Low was called solemnly to come in, or else hee to lose his writ of right. Then, after a certain time, the sureties of Henry Nailor were called, to bring in the said Nailor, champion for Simon Low; and shortly thereupon, Sir Jerome Bowes, leading Nailor by the hand, entreth with him the lists, bringing him down that square by which he entered, being on the left hand of the Judges, and so about, till he came to the next square, just against the Judges; and there making curtesie, first with one leg, and then with the other, passed forth till he came to the middle of the place, and then made the like obeysance, and so passing till they came to the barre, there hee made the like curtesie, and his shield was held up aloft over his head. Nailor put off his neather stockes, and so, bare foote and bare legged, save his silke scanilonions, to the ancles, and his doublet sleeves tyed up above the elbow, and bare headed, came in as is aforesaid. Then were the sureties of George Thorne called, to bring in the same Thorne; and immediately Sir Henry Cheiny, entering at the upper end on the right hand of the Judges, used the like order, in coming about by his side, as Nailor had before on that other side, and so coming to the barre with like obeysance, held up his shield. Proclamation was made in forme as followeth:—The Justices command in the Queene's Maies. name, that no person of what estate, degree, or condition that he be, being present, to be so hardy to give any token or signe, by countenance, speech, or language, either to the prover or to the defender, whereby the one of them may take advantage of the other: and no person remove, but still keep his place; and that every person and persons keepe their staves and their weapons to themselves; and suffer neither the said proover nor defender to take any of their weapons, or any other thing, that may stand either to the

occasion, in the Court of King's Bench, might justify surprise, if we did not allow for a certain

said proover or defender any availe, upon pain of forfeiture of lands, tenements, goods, chattels, and imprisonment of their bodies, and making fine and ransome at the Queene's pleasure.

“ Then was the proover to be sworne in forme, as followeth : —This heare, you Justices, that I have this day neither *cate*, *drunke*, nor have upon me either bone, stone, nor glasse, or any enchantment, sorcerie, or witchcraft, wherethrough the power of the word of God might be inleased or diminished, and the Devil's power increased; and that my Appeale is true, so helpe me God and his Saints, and by this Booke.

“ After this solemne order was finished, the Lord Chiefe Justice, rehearsing the manner of bringing the writ of right by Simon Low, of the answeare made thereunto by Paramore, of the proceeding therein, and how Paramore had chalenged to defend his right to the land by Battell, by his champion George Thorne, and of the accepting the trial that was by Low, with his champion Henry Nailor; and then, for default in appearance in Low, he adjudged the land to Paramore, and dismissed the champions, acquitting the sureties of their hands. He also willed Henry Nailor to render againe to George Thorne his gauntlet, whereunto the said Nailor answered, that his Lordship might command him any thing, but willingly he would not render the said gauntlet to Thorne, except he would win it; and further, he chalenged the said Thorne to play with him halfe a score blowes, to shew some pastime to the Lord Chiefe Justice, and the other there assembled; but Thorne answered, that he came to fight, and would not play. Then the Lord Chiefe Justice, commending Nailor for his valiant courage, commanded them both quietly to depart the field, &c.”

The anecdote of Thorne is thus related by a writer quoted

professional affectation of ignorance, very proper, perhaps, to the due discharge of their du-

by Dr. Henry: "Nailer, champion for Lowe, challenged Thorne, his antagonist, to plaie with him half a score blowes, for pastime to the Judges; but Thorne sullenly refused, saying, 'he came to fight, and not to plaie.'" *Hen. Hist. of Gr. Brit.* vol. vii, p. 50.

The Kynes may seem to have been troublesome litigants for land. In the reign of King John, we find "Simon de Kyme fined in five marks, for wagering Duell for the land of Baenbure, after he had acknowledged to the King that he had no right to it."—*History of the Exchequer*, p. 349.

Blackstone somewhere observes, that Battle, in writs of right, rather resembled the exhibition of an athletic rural sport, than a serious and mortal engagement. A contemporary writer erroneously remarks, that it is doubtful whether any Battle has been actually fought in England, on a writ of right, for these two hundred and thirty years; but one is mentioned so late as 1638—only one hundred and eighty years ago. See page 101, note.

The following is from a tract of Mr. afterwards Sir John Davies, written in 1601: "The Manner of Gaging Battail in Case of Murder or Robbery: The defendant having pleaded not guilty, and having put himselfe upon defence by his body, the Plaintiff was demanded by the Courte, and commanded to take the defendant by the left hand, and say unto him, laying his right hand upon the book, and calling him by his name of baptism; 'T . . . , whom I hold by the hand, I doe heere charge thee, that thou such a yeare and daye didst feloniously robe me of two of my kine, *and this I am ready to aver by my body*, as a good and lawfull man, and that my Appeale is true; soe help me God and his Saints.' Then they disjoined their handes again, and the Defendant tooke the Plaintiffe by his *left* hand, and spake to him in this manner: 'W. (calling him

ties. On the side of an Appellor, the Learned Counsel is said to have expressed himself sur-

likewise by his Christian name) ‘whom I hold by the hand, thou hast falsly lyed uppon me, for that I did not robe thee of thy kine, as thou hast charged me, and this am I ready to maintaine by my bodye and that my deffense is true; soe help me God and his Saints.’ Then the Plaintiff, within three dayes, found pledges of his Battail, and went at liberty, but the Defendant was commanded to the Marshall, who was to suffer him to have his ease, and *manger et boyer*; and the Plaintiff was commanded, that the night before the Battail he should come to the Marshall, to be arrayed and armed by him, so that he might be ready the next morning, at the rising of the sun, to do Battail. The Appellant’s head was ever covered, but the Defendant’s rayed; yet upon an endictment, if the party indited became an approver, his head was rayed, and the Appelee was covered, and generally in the Battail, upon an Appeal, the staves of the combattants had knobbs, and therein differed from the bastons of the champions in a writt of right. At the time of the Battail, if either of the parties was cast to the earth, the Judges might interrupt the Battail, and cause the party, that is in such distress and disadvantage, to come before them, and then demand if he will have any more of the Battail, and if he answer he will, then is he to be layed in the same disadvantage, and if he refuses to fight, he is presently to be hanged.”

The height to which the practice of Appeals has been carried in times past may be guessed from the following anecdote of an occurrence in France, under the reign of Louis VIII. The story will be the more acceptable to the general reader, because it is that which, with much alteration, has been lately wrought into a theatrical entertainment, under the title of the *Forest of Bondy, or the Dog of Montargis*:—

“ The fame of an English dog has been deservedly trans-

prised at the joining issue by Battle on the part of the Appellee ; and on the side of the Appellee,

mitted to posterity by a monument in basso-relievo, which still remains on the chimney-piece of the grand hall, at the castle of Montargis in France. The sculpture, which represents a dog fighting with a champion, is explained by the following narrative.

“ Aubri de Mondidier, a gentleman of family and fortune, travelling alone through the forest of Bondi, was murdered, and buried under a tree. His dog, an English blood-hound, would not quit his master's grave for several days ; till at length, compelled by hunger, he proceeded to the house of an intimate friend of the unfortunate Aubri's, at Paris, and by his melancholy howling seemed desirous of expressing the loss they had both sustained. He repeated his cries, ran to the door, looked back to see if any one followed him, returned to his master's friend, pulled him by the sleeve, and with dumb eloquence entreated him to go with him.

“ The singularity of all these actions of the dog, added to the circumstance of his coming there without his master, whose faithful companion he had always been, prompted the company to follow the animal, who conducted them to a tree, where he renewed his howl, scratching the earth with his feet, significantly entreating them to search that particular spot. Accordingly, on digging, the body of the unhappy Aubri was found.

“ Some time after, the dog accidentally met the assassin, who is styled, by all the historians that relate this fact, the Chevalier Macaire ; when, instantly seizing him by the throat, he was with great difficulty compelled to quit his prey.

“ In short, whenever the dog saw the chevalier, he continued to pursue and attack him with equal fury. Such obstinate virulence in the animal, confined only to Macaire, appeared very extraordinary, especially to those who at once recollected the

another Learned Counsel is described as apologising for the course taken, and as resting his

dog's remarkable attachment to his master, and several instances in which Macaire's envy and hatred to Aubri de Mondidier had been conspicuous.

" Additional circumstances created suspicion ; and at length the affair reached the royal ear. The king (Louis VIII) accordingly sent for the dog, who appeared extremely gentle till he perceived Macaire, in the midst of several noblemen ; when he ran fiercely towards him, growling at and attacking him as usual.

" The king, struck with such a collection of circumstantial evidence against Macaire, determined to refer the decision to the chance of Battle ; in other words, he gave orders for a Combat between the chevalier and the dog. The lists were appointed in the Isle of Nôtre Dame, then an unclosed, uninhabited place ; Macaire's weapon being a great cudgel.

" The dog had an empty cask allowed for his retreat, to enable him to recover breath. Every thing being prepared, the dog no sooner found himself at liberty, than he ran round his adversary, avoiding his blows, and menacing him on every side, till his strength was exhausted ; then, springing forward, he griped him by the throat, threw him on the ground, and obliged him to confess his guilt, in the presence of the king and the whole court. In consequence of which the chevalier, after a few days, was convicted upon his own acknowledgment, and beheaded on a scaffold in the Isle of Nôtre Dame."

The above recital is translated from '*Mémoires sur les Duels*;' and is cited by many critical writers, particularly Julius Scaliger, and Montfaucon. Montfaucon has given an engraved representation of the sculpture of the Combat, mentioned above.

In the year 1398, King Richard II caused a theatre to be built in the town of Bristol, for a Combat to be fought

apology upon the sole (though abundantly reasonable) ground of the danger to which the Appellee

between two Scots, the one an Esquire appellant, and the other a Knight defendant; the *Appellant* was overcome, and hanged.

Of the Appeals on record, those of Treason (perhaps on account of their public nature are the most frequent; and in these cases, different from those of Felonies, or, as these were once esteemed, *private* wrongs, the King's interest being at stake, the King was free to exercise the royal mercy upon the vanquished. He might spare the capital punishment, though upon what condition he pleased.

"In the Octaves of the Epiphany, [anno 1096,] the King [William II] and all his Nobles were at Salisbury; there, Godfrey Bainard accused William de Ou, [Hou or How,] the King's Kinsman, of Treason, in the King's Court, and vanquished him in single Combat; whereupon the King commanded William de Ou's eyes to be put-out, and his testicles to be cut off." *Madox's Hist. of the Exchequer*, p. 6.

Is not this barbarous act unfortunately connected with our antiquities, in what relates to manners—and not the manners of England only, but of the world? Do not these mutilations of an adversary fallen in battle, correspond with the practices of *gouging*, *biting*, &c. still practised in the fighting of the northern and other parts of this kingdom, and thence carried to North America; and with the more splendid cruelties practised upon captured kings, formerly in Europe, and to this day (as in the case of Shah Allum, and other later sufferers) in Asia? Of the brutality of our ancient manners, the ballad of the Hunting of the Hare (Metrical Romances, vol. III.) is some testimonial; and it is probably true, that nothing has done so much to inspire generous sentiments into the multitude (in relation to fighting) as the modern professed *pugilism*. In Virginia and Kentucky, our countrymen have introduced the

must be exposed, in the event of a Second Cri-

practices of kicking, biting, gouging, &c. when the fallen party is in the power of his enemy, so effectually and generally, that in the state last mentioned, a legislative provision has been made, to enable persons losing their ears on these occasions, to record the same with the county clerk of the peace, and to produce the record in support of an action of slander, if the loss should afterward be attributed to the pillory! By the way, are not the *crackers* (the *boasters*, and strictly the *quarrelers*) of Yorkshire in England, Virginia, &c. the same with the *valemtoens* and *bravoës* of Brazil, and the heroes described (above) from Stiernhöök, who commenced their provocations by "I am as good a man as you?" &c. Let it be repeated, that modern pugilism inspires generous sentiments into the people—sentiments which are too apt to be absent where *rules of fighting* are not observed. A wretch, even in New England (the general counterpart to Virginia), a short time since, sprung upon the *daughter* of a man who had offended him, whom he found milking her cow, and, with his thumb, forced (gouged) out one of her eyes, bit off her upper lip, &c.

Next to that of Edgar the West Saxon, with Canute, the oldest Battle on record in our history, is the following: "Henry de Essex, hereditary standard-bearer of England, fled from a battle in Wales, A. D. 1158, threw from him the royal standard, and cried out, with others, 'That the King was slain.' Some time after, he was accused of having done this with a treasonable intention, by Robert de Montfort, another great baron, who *offered to prove the truth of his accusation by Combat*. Henry de Essex denied the charge, and accepted the challenge. When all preliminaries were adjusted, this Combat was accordingly fought, in the presence of Henry II, and all his Court. Essex was defeated, and expected to be carried out to immediate execution. But the King, who was no friend to this kind of trial, spared his life, and contented himself with confiscating

minal Trial by Jury, amid the "extraordinary

his estate, and making him a monk in the abbey of Reading." *Henry's Hist. of England*, vol. III, p. 356.

The last Wager of Battle, in a case of Treason, was in 1631, when Donald, Lord Rea, was the Appellant, and David Ramsay, Esquire, the Appellee.

"The Priory of Tinnmouth, in Northumberland, was a cell of the abbey of St. Alban's. One Simon, of Tinnmouth, claimed a right to two *corrodies*, or the maintenance of two persons in the priory, which the prior and monks denied. This cause was brought before the Abbot of St. Alban's, and his court-baron, who appointed it to be tried by Combat, on a certain day, before him and his barons. Ralf Gubion, prior of Tinnmouth, appeared, at the time and place appointed, attended by his champion, one William Pegun, a man of gigantic stature. The combat was fought, Pegun was defeated, and the prior lost his cause; at which he was so much chagrined, that he immediately resigned his office. This Judicial Combat is the more remarkable, that it was fought in the court of a spiritual baron, and that one of the parties was a priest." *Henry*, p. 357.

In a dispute concerning the right of patronage to the church of St. Andrew, Northampton, anno 1729, between the prior of Lenton and Thomas de Staunton, "The cause was agreed to be decided by *single* Combat; William Fitz-John undertaking to fight for the prior of Lenton, and William Fitz-Thomas on the behalf of Thomas de Staunton. On the day appointed, the combatants coming armed into the field, were sworn at the bar, according to antient custom. But the respective parties desiring licence of agreement, the said Thomas de Staunton gave up all his right in the advowson for himself and his heirs, to the said prior and his successors for ever." *Bridges's History of Northampton*, vol. I. p. 511.

A Combat was *granted* by Edward III, and fought near Berwick, between Sir John de Sitsilt, and Sir John de Fapken-

and unprecedented prejudice disseminated against

ham, concerning the arms now borne by the Cecils. The coat was challenged by Sitsilt, but worn by Faukenham. They began to fight, but the matter was soon determined by the King.

The following are casual notices respecting Wagers of Battle in England, most of which serve to show the evils with which they have always been attended, and the necessity which subsisted of watching with the greatest strictness the motives of the Appellants.

“Anno 1344, Rich. II. A Combat was *granted* to an Esquire, born in Navarre, to fight an English Esquire, called John Welsh, whom the Navarrais accused of treason. But the true cause of the Navarrais, his malice was, that the said Welsh had dishonoured his wife, as (being vanquished) he confessed. The King gave sentence he should be drawne and hanged.”

Henry II. “Rafe de Hertwelle fined twenty shillings to *have* his Duell in the King’s Court.” *Hist. Excheq.* p. 66.

Richard I. “Gerard de Brocton gave forty shillings to *have* his Duell in the King’s Court.” *Ibid.* p. 67.

“Robert Fitz-Gerard fined in two ounces of gold, that he might recover his land by Duell.” *Ibid.* 294.

“Serlo, son of Turlaueston, gave ten marks, that he might make his defence, in case he was appealed for a certain homicide.” *Ibid.* 296.

“William Wischard fined in four pounds and six shillings, to have an enquest of the Visnue, to find whether he was appealed out of ill-will or not.” *Ibid.*

“William Buhurst fined in two marks, to have an inquest, to find whether he was appealed for the death of one Godwin out of ill-will, or for just cause: and Richard de Leechesman fined in one mark for the like.” *Ibid.* 302.

“William de Andeford gave two marks for attaching Jordan

him throughout the country * ;” as if either gen-

de Belnei and others, who were appealed of his father's death.” *Ibid.* 304.

“ Hugh Peverel fined in ten marks, that the Sheriff might enquire, whether Walter Fitz-John appealed Daniel de Nime-lande of his brother's death, out of hatred or not.” *Ibid.* 305.

“ Adam Bland, of Bodmine, fined in two marks, that there might be a Duell between him and Walter de Stolde, for two hundred pieces of tin, which Walter said that Adam had stolen from him.” *Ibid.* 307.

“ Odo de Dammartin fined in two Palfreys, to have a Pone against Richard Haeun, touching a Duell waged between them for land in Hamelinton.” *Ibid.* 307.

“ Arabel Pancefot fined in six pounds three shillings and four pence, that the Duell between her and Robert her brother might be hindered.” *Ibid.* 311.

“ Emmue, the Priest of Nethford's Concubine, was amerced for a False Appeal.” *Ibid.* 386.

* See the Newspaper Reports of the Proceedings in the Court of King's Bench, *Ashford v. Thornton*, Nov. 17, 1817. — The “extraordinary and unprecedented prejudice disseminated,” against the Appellee in this case, is, indeed, worthy of observation; and the part which the daily press has taken in the transaction, evinces what an injury upon society the press may be rendered, — an injury not always to be averted by the freedom of discussion which it supposes, and the opportunity which it affords for the publication of writings, as well on one side of a question as on the other. The truth is, that there are certain assertions, and certain arguments, which will always have more popularity than others; and it is an act of great simplicity to say, that when a lie or a sotticism has been uttered, the utterance of a denial or a refutation is a cure. Falsehood,

tleman could be ignorant, not only that Trial by Battle is matter of law, but that in point of

for the most part, is received with more readiness than truth, ignorance than learning, and folly than good sense. In the case under consideration, we have seen all the daily presses in the country engaged in hunting down an individual—in demanding the blood of a supposed offender, but one who has already been acquitted by a Jury! It was to oppose a feeble resistance to this overwhelming torrent—which no one else opposed—that I first ventured upon this Argument.—As to the question of bringing such a person, under such circumstances, to a second trial, one observation presents itself, which, though perhaps a little out of its place, may be pardoned here. When, in the year 1774, (see Appendix,) the merits of Appeals of Murder were casually discussed in the House of Commons, Mr. Stanley judiciously remarked, “I think it hard that a man should be tried twice for the same offence, *and when you have an advantage, by knowing his secrets and defence.*” Now, in the present case, it is universally said, (however absurdly, ignorantly, and cruelly) that the “secret and defence” of the Appellee is an *alibi*; that that was the only ground of his acquittal, and is the only ground upon which his innocence can be presumed. Now, this *being known*, what follows? Why, that the business of his prosecutor must be, to defeat the plea of *alibi*; and how may this be done? We need say nothing of the merits of the actual prosecution. Every thing may be pure in this instance. But what a temptation to produce suborned witnesses, and even those who may disinterestedly perjure themselves? What falsehoods witnesses will swear to, almost exceed belief; and we shall betray great ignorance of human nature, and great unfitness for the affairs of the world, if, on every occasion of falsehood and perjury, we suppose ourselves reduced to the necessity of imputing a corrupt motive. It is

fact, it is the Appellor, (the legal capacity for Battle supposed) who is the first to *offer* and even *de-*

well observed by Lord Shaftesbury, that we are mistaken in imagining self-interest to be the only principle on which men act. Passion is even more powerful than self-interest. Men daily follow it, not only to the injury of others, but of themselves. The daily press, in the disgraceful course it has pursued in the present instance, has not had a corrupt or selfish motive; it has been actuated by passion; by what the noble author, just named, denominates an abuse of the social principle; a misuse of the affections for universal right and truth; a blind and mistaken zeal for justice. But what need we do more, than imagine the language of witnesses presented to a Jury, if they only carry with them the exasperated feelings and indolent prejudices, which we have witnessed in the daily press, and in the conversation of private society?

Prejudice is the result of indolence. Every question that can be presented to the mind, produces a state of inquietude, of which the majority presently grow weary. They love, therefore, to "make up their minds;" and, to accomplish this point, they take the shortest road. An acquiescence in the doctrine, that the want of an *alibi* is sufficient to establish guilt, is an example. An *alibi* is a complete proof of innocence; but the want of it is no proof of guilt. Let any reader ask himself, whether he cannot recollect a thousand several moments of his life, with respect to which, had he been charged with an offence committed at the juncture, he would have been unable to prove an *alibi*?

A case, indeed, has recently presented itself, where the want of an *alibi* was a conclusive proof of guilt. It is that of the Holdens, and their companions, executed at Shetfield, for the murder of two females. In that case, *four* men were *severally* charged to have been seen, sometimes together, and sometimes

mand Battle; and that the part of the Appellee is only to grant Battle, or accept the challenge, provided the Court is of opinion, that under the circumstances which appear, he cannot refuse to answer the complaint of the Appellor. If he does answer, he answers by *granting* Battle. As to the rest, the Learned Counsel who advised the *granting* of Battle; in the case alluded to, are entitled to the thanks, not of their client only, but of the entire country, for having thus attempted to arrest the progress of a prosecution under the barbarous Law of Appeal.

apart, in the immediate vicinity of the scene of the murder; and not *one* of those *four* men attempted to prove that he was elsewhere. Innocence, under these circumstances, is incredible; and the religious character with which it was attempted to clothe their denial, is only one more testimony to the truth of the important rule, That religion is good or bad, accordingly as it is used. By adverting to the distinction between the case of four persons, severally unable to prove an *alibi*, and that of a solitary individual, who, though innocent, may be unable to prove it, we shall enlighten our judgment upon the question. As to the guilt or innocence of Abraham Thornton, we ought to lay the *alibi* wholly out of view, except in this case only,—that it can be proved to be falsely set up. The false pretence of an *alibi* would be a suspicious circumstance,—though even an innocent man, but not an *honourable man*—not a hero—not a martyr—might resort to it, in order to persuade a Jury of his innocence, and repel a cloud of unfavourable circumstances;—but the want of an *alibi* is no proof of guilt.

54. But the last resource of the friends of *second criminal trials* is in the doctrine of *exceptions* to the allowance of Battle ; and here, I confess, that deep as is my sense of the imperfection with which I conduct every part of the Argument, and irrefragable and conclusive as is the evidence to be offered against the popular interpretations on the point,—I commence this branch of the inquiry with increased apprehension, and almost with a despair of succeeding in the attempt to produce a right impression on the mind of the reader. The case is, that so decided a perversion of the ancient and reasonable usage has obtained in modern times—the inutility of Appeals, under the modern administration of justice, and their inconveniences under all circumstances, have brought them into so much disuse, and their disuse into so much forgetfulness, and involved us all in so much ignorance concerning them, that we are misled, at every step, by the very terms employed, mistaken, as we perpetually are, in the application. If we have been diverted, at the theatre, by the awkwardness and blunders of the Clown, who puts boots upon his hands, and gloves upon his feet, or who misapplies every article of the dress of a fine lady ; if we know what it is to be whirled round in the dark, and then mistake the north for the south, and the south for the north ; or if we can figure to ourselves the per-

plexity which attends the developement of the fragments of an ancient building, when every morsel is either put into a wrong place, or else set topsy-turvy ; then, and then only, we shall be able to comprehend the task that is before us, when we attempt to trace, by the light of its sepulchral lamp, the slumbering and buried Law of Appeals. For myself, I proceed with difficulty, and I solicit indulgence.

55. A fundamental error of our modern interpreters is, that they suppose Battle an adjunct to a pre-existing Law of Appeal ; whereas the real definition of an Appeal is, a call or summons to Battle*.

* Upon this point I have already adduced several testimonies, to which I shall not now recur. The following, however, are additions to my proofs (page 192) that an Appellor is truly a *challenger*. He makes a charge, and offers to fight the man whom he accuses, if the Court will allow him so to do. Hence the appropriate term of “granting” a Duel or Combat, which has repeatedly occurred in the authorities cited in these pages, and which “granting a Duel” is the true phrase for “allowing an Appeal.”

“ Et se il le noie, il est prest de prover le tout *enci com la Court esgardera ou connoistra que il prover le doie*, et vées ci son gage.” Assises, chap. xciii. See the form of a Count of Appeal, (page 64, above) where, however, observe the omission of the words “vées ci son gage”—the suppression of the circumstance, that the Count of Appeal is a challenge to a Combat. Further, the words “enci com la Court esgardera ou connoistra que il prover le doie” appear, in the Assises, to

56. A *second* fundamental error, immediately connected with the former, is that of speaking

be used synonymously with those “se il le noie, il est prest de prover le de son cors contre le sien, &c. ;” since these several forms occur in the ninetyeth and ninety-third chapters of the Assises respectively, both which chapters relate to Appeals of Homicide ; and since *Battle* plainly appears, in those chapters, to be the thing sought by Appeal of Homicide, and the pleas by which *Battle is to be avoided by the Appellee*, that is, how the Appellor is to be nonsuited, occupy the gravest attention of the author.

The proofs, that the Appellant is the true challenger to Battle, might be carried much further ; 1. By showing that such is the understanding of all the old authorities ; and, 2. By examples of early proceedings in the English Courts themselves. With respect to the first, the Grand Customier de Normendie agrees, on this point, with the Assises de Jerusalem ; and to the same effect is the language of Beaumanoir, in his work on the Coutumes de Beauvoisis :—“ Qui droitement vient Apeler, il doit dire ainsint, si chest pour Meindre : ‘Sire, je di sur tel, (& le doit nommer,) que il mauvesment & en traison m’a murdri tele persone (& doit nommer, mort, qui mes parens estoit, & par son trait, & par son fet, & par son pourchas, (se il le connoist), je vous requier que vous en faciés comme de murdrier : se il le nie, je le eucil prouver de mon cors contre le sien, ou par homme qui fere le puist & doie pour moi, comme chil qui a essoine ; lequel je monsterroi en tans & en lien bien.’ Et se il apele sans retenir Avoué, il convenra que il se abate en se persone, et ne puet puis avoir Avoué.” *Coutumes de Beauvoisis, par Philippe De Beaumanoir : avec des notes & observations par Gaspard Thaumassière.* Paris. 1690. Ch. XI.

“This treatise of Beaumanoir is so systematical and complete, and throws so much light upon our ancient Common Law, that

of the Appellee as the party which *wages* Battle. To "*wage* Battle," is to present a gage, (*guage*)

it cannot be too much recommended to the perusal of the English antiquary, historian, or lawyer. He kept the Courts of the Comte de Clermont, and gives an account of the customary laws of Beauvoisis (which is a district of country about forty miles northward of Paris) as they prevailed in the year 1283. He is consequently a more ancient writer than Littleton; and, to speak with all due deference of the father of the law, perhaps a better writer. It need hardly be said, that the customs and laws of the two countries were at this time very similar, especially of the more northern parts of France: if it wanted other proof, the commentators upon the oldest French law books cite Littleton as illustrating their customs." *Barrington's Observations upon the Statutes.*

That the early proceedings of the English Courts demonstrate an Appellant to be a challenger, by the use of the same words with those employed by the French lawyers, an example presents itself in a Battle, in Appeal of Robbery, fought in the reign of Henry III. Madox, in his history of the Exchequer, has printed the record, and furnished us with the following account of the incident to which it refers:—"Now we are speaking of Duells, I will lay before the reader a pretty remarkable case of a Duell that was fought in the reign of King Henry III, between Walter Blowberme, an approver, and Hamon le Stare; together with a draught or figure of the Duell, as it was drawn at that time¹; the case was this: Walter Blowberme appealed Hamon le Stare of Robbery; alledging, that they were together at Winchester, and there stole cloaths and other goods, whereof Hamon had, for his share, two coats; to wit, one of Irish cloth, and the other a party-coat of cloth of Abendon and Burell of London: and that he (the said Walter) was in fellowship with the said Hamon in the said Robbery,

¹ See the engraving that faces the Title-page; and also the Appendix.

wage, or pledge of Battle; and this is properly done by both parties alike, *and by the Appellor*

he offereth to prove by his body, as the Court shall award. Hamon came, and denyed the whole. And saith that he will defend himself by his body. Whereupon it was awarded, that there should be a Duell between them. A Duell was struck. And Hamon, being vanquished in the Combat, was adjudged to be hanged." The record is in the form following: "Idem Walterus [sc. Blowberme, probator] venit, & appellat Hamonem le Stare de Wyntoniam per eadem verba [viz. de latrocinio]; scilicet, quod fuerunt de Cruce apud Wyntoniam, et ibi furati erant pannos & alia bona, unde . . . Hamo habuit ad partem suam duas tunicas, unam scilicet de panno de Hybernia, & unam tunicam partitam de panno de Abendon & de Burello Londoniæ; & quod simul fuit cum eo ad faciendum dictum latrocinium, *offert disrationare per corpus suum, sicut Curia consideraverit, &c.* Et Hamo venit, & defendit totum: [Et dicit] quod vult se defendere per corpus suum, &c. Ideo consideratum est quod Duellum sit inter eos, &c. Et [et Du] ellum inter eos percussum. Et prædictus Hamo succubuit. Ideo ad Judicium de eo, &c. Nulla habuit catalla." *Madox's Hist. of the Exchequer*, p. 383. Note.

Distinctly to the same effect is Verstegan, in his work on Saxon Antiquities, appropriately entitled, "Restitution of Decayed Intelligence, &c.:" and here I shall quote in full the account given by that writer of the Judicial Combats of the Saxons; an account which, as far as Verstegan and his authorities may permit, will substantiate several particulars hitherto advanced but as conjectural in these pages. My guide is rather *reason* than *reading*; and, as the press proceeds, I meet with books which confirm what I had at first only diffidently proposed.

"They had among them," [the Saxons] says Verstegan, "four sorts of Ordeal, which some, in Latin, translate *Ordalium*. 'Or' is here understood for 'due' or 'right'; 'deal' for

first. The part of the Appellee is to *accede* to the demand of Battle by the Appellor. The

‘part,’ as yet we use it; so as ‘Ordeal’ is as much as to say, as ‘due part;’ and at this present time it is a word generally used in Germany and the Netherlands, instead of ‘dome’ or ‘judgment.’ These sorts of Ordeal they used in doubtful cases, when cleere and manifest proofs were wanted, to try and finde out whether the accused were guilty or guiltless.

“The first was by Kamp-fight, which, in Latin, is termed Duellum, and in French, Combat. The second was by iron made hot; the third was by hot water; and the fourth was by cold water.

“For the trial by Kamp-fight, the accused was, by peril of his own body, to prove the accused guilty, and, by offering him his glove, to challenge him to this trial, which the other must either accept of, or else acknowledge himself culpable of the crime whereof he was accused. If it were a crime deserving of death, then was the Camp-fight for life and death, and either on horseback or on foot. If the offence deserved imprisonment, then was the Camp-fight accomplished, when the one had subdued the other, by making him to yeeld, or unable to defend himself, and so be taken prisoner. The accused had the liberty to chuse another in his stead, but the accuser must perform it in his own person, and with equality of weapons. No women were admitted to beholde it, nor no men-children under thirteen years. The priests and people that were spectators, silently prayed that the victory might fall unto the guiltless; and if the fight were life or death, a beer stood ready to carry away the dead body of him that should be slaine. None of the people might cry, sericke out, or make any noyse, or give any signe whatever; and hereunto, at Hall, in Suevia, (a place appointed for Camp-fight) was so great regard taken, that the executioner stood beside the judges, ready with an

Appellor is the agent (*l'acteur*), and the Appellee the subject, in relation to Battle. "Se

axe, to cut off the right hand and left foot of the party so offending.

"He that (being wounded) did yeeld himself, was at the mercy of the other, to be killed or to be let live. If he were slaine, then was he carried away, and honourably buried, and he that slew him reputed more honourable than before; but if, being overcome, he were left alive, then he was, by sentence of the judges, declared utterly void of all honest reputation, and never to ride on horseback, nor to carry armes." *Verstegan's Restitution of Decayed Intelligenc.*. Small 4to. 1634. p. 65.

Verstegan cites *Speculum Saxon.* lib. 1. &c. &c.

"'Camp,' or 'Kemp,'" says the same writer, "properly 'one that fighteth hand to hand;' wherunto the name of Kemp-fight accordeth, and in French of Combat. Certain among the ancient Germans made profession of being Camp-fighters, or Kemp-fighters; for all is one; and among the Danes and Swedes were the like; as Scaecater, Arngrim, Arnerod, Haldan, and sundry others. They were also called Kempanas, whereof is derived our name of 'Champion,' which, after the French orthography, some pronounce 'Champion.' A 'Cemp' or 'Kemp' is also sometimes taken for 'a souldier,' in regard that his profession is to fight."

On the foregoing we may here remark,

1. That the author has almost needlessly called in the aid of French orthography to identify the Saxon Lempan with the English Champion; the Saxon *c* having frequently the sound of *ch*; as in *ceapman*, *ceorle*, *cild*, *ciste*, *ciric*, &c. which we pronounce *chapman*, *churl*, *child*, *chest*, *church*, &c. The *k* has no proper place in the Saxon alphabet, and hence the names *Kemp* and *Champ* are the same; both standing for the Saxon *Cemp*.—In passing, may we ask, whether the plant *Rose* *Campion* is not so called as being the Champion's (*Lempan's*)

aerdre à Bataille," is the phrase of the Assises de Jerusalem ; and the obsolete verb, "se aerdre,"

rose, wreath, or decoration? All the names, given by botanists to the several species, seem to countenance the probability of such a popular use of its flowers; as, Flos Jovis, Cœli Rosa, and Agrostemma, "the garland of the field."

2. We are now in condition, also, to explain what is told us by Blackstone, concerning the loss of his Free Law (*liberam legem*) by the vanquished in Battle; and the explanation will serve (as conjectured at page 144) to demonstrate still more incontrovertibly the Saxon origin of this mode of Trial; as it likewise, at the same time, confirms what has been before insisted on above, that the maintenance of a man's veracity, the *making good his word*, is the real design of Battle. If a combatant is vanquished, "he is condemned," according to Blackstone, "as a recreant, *amittere liberam legem*, that is, to become infamous, and not be accounted *liber et legalis homo*; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause." (iii, 22). Again, when speaking of Wager of Law, the Learned Commentator remarks, that "Wager of Law was never permitted, but where the defendant bore an irreproachable character." (*Ibid.*) Lastly, Verstegan tells us, "that if a man was vanquished, but not killed nor executed, he was declared, by sentence of the judges, utterly void of all honest reputation," &c. Now, Blackstone does not appear to have observed, that Wager of Law, (*legem sacramentum*) is the Free Law, or part of the Free Law, (*legem liberam*) which stands so prominently forward in the Saxon code, and which was so popular a mode of trial. But, as the vanquished in Battle was considered as not having *made good his word*, and therefore as *perjured*, a vanquished person stood in the situation of one who, in our own day, has been found guilty of *perjury*. Consequently, as none could have the benefit of

is equivalent, according to the glossaries, to the modern verb “s’accorder.” Let the reader consider the following passages, extracted from the Assises, and decide for himself, whether it is not the *Appellee* who is called to Battle:—“Et aucuns dient, que se la Defiëndoir *s’en aert* à l’Apeleoir de Bataille autrement que par esgard ou par conoissance de Court, et il vaine son adversaire, que il la conviendroit apres à combatre contre son plus prochain parent, se il l’en apeleoit; mais à se me semble, &c *.” And again: “Se aucun apelle autre de murtre, et il n’est de

Free Law, or the mode of trial allowed to *freemen*, (the oaths of slaves or villeins not being admitted) a vanquished person was put out of the condition of a freeman; and being so put out, on account of his imputed crime, was infamous; and instead of the general words, “void of all honest reputation,” and “a fair and irreproachable character,” we are to understand the particular qualities of “worthy” or “unworthy of credit.”

3. It is remarkable that Selden, who, in his *Duello*, refers to Verstegan, for proof, that Trial by Battle was known to the Saxons, seems to be by no means aware of the particularity of the evidence afforded by the author.

4. What is said by Verstegan, of the professional Champions of Germany and Sweden, throws great light upon the dangers to which innocent persons were exposed by Appeals to Battle, as described above, (page 152, note,) and adds strength to the suggestion, at p. 161, concerning the *Crackers* of Virginia, and *Valentines* of Brazil, &c.

5. There are other features in Verstegan’s account, of which due notice shall be taken in their respective places.

* Assises de Jerusalem, chap. lxxxix.

ceaux que pevent faire Apeau de Murtre, l'Apellé se peut enci deffendre, que il doit faire dire, Que il noie et deffent le murtre, mot à mot, se com il li met sus, et que il est prest que il se deffende de son cors contre le sien, *se la Court l'esgarde que à lui s'en doive aerdre*, et faire ne le veaut que la Court ne l'esgarde, et dit pourquoi; pour ce que il n'est mie parent dou murtri, ne attaignant à lui de aucune chose tel pourquoi il puisse faire Apeau dou Murtre de ce cors; *pourquoi il à lui ne s'en vcaut aerdre, se la Court ne l'esgarde*, et de ce se met en l'esgarde de la Court, sauf son retenail *.”—But the words of Verstegan are express to this point; and they contain, I am satisfied, the true law of the case: “In the Trial of Kamp-fight, the accused was, *by the peril of his own body*, to prove the accused guilty: and, *by offering him his glove*, to challenge him to this trial, which the other must either accept of, or else acknowledge himself culpable of the crime whereof he was accused †.” Exactly corresponding, also, is the statement which is left us of one of the most ancient examples of Trial by Battle, and which occurred during the reign of Louis the Pious. “Bera, a knight of high rank at his court, was accused of having maintained a correspondence with the Africans and infidels in Spain. He repaired to Aix, where the King kept his

* Assises de Jerusalem, chap. xcii.

† Verstegan, p. 64.

court. His accusers persisted in the charge, *and threw him a pledge*. Bera took it up, and *threw* his in return, asserting that the accusation was false, and that he was neither a traitor nor perfidious. A Combat was appointed, and Bera (being vanquished) acknowledged that he was guilty. The King [the offence being treason] granted him his life, but his coat of arms was broken, and he was banished for life to Rouen."

—To add a word upon a question of less importance, it is proper to mark, as of doubtful accuracy, the phrase, "*throwing a glove*," in the proceedings of the Judicial Combat; since, though the glove was *thrown*, in challenges to Duels not applied for to the Courts, yet, in the latter case, it appears to have been always *presented*, the party *knocking*.—"It was customary for knights to give, by way of challenge, a certain sign or pledge, which usually consisted in a glove. The person offended sent it to his antagonist, or directed it to be thrown at his feet; and the latter, by taking it up, signified his acceptance of the challenge. This glove was sometimes stained with blood. Such was that sent by Renatus of Anjou, to Alphonso, king of Naples, as a challenge to fight with him for that kingdom. Other things were likewise employed for the same purpose, such as a ribband, a bloody cloth, or a cap. It was delivered by a herald or a trumpeter, in the presence of respectable witnesses; at the same time the ground of accusa-

tion was notified, as also the place for the Combat, and the weapons." This refers to private or *unlawful* Duels; but in public or *lawful* Duels, the pledge was presented *kneeling*.

57. A *third* fundamental error, also connected with the foregoing, and bringing us immediately to practical truths, consists in supposing, that in the age when Appeals were in use, the *hardship* of Battle was thought to rest upon the *Appellor*, instead of the *Appellee*. Whoever will read the ancient books, will find himself at no loss to discover, that the anxieties of ancient lawyers were chiefly and necessarily directed (as they ought to be directed at present,) to the protection of innocent persons against *Appeals to Battle*,—for such, let it be continually repeated, are all Appeals of Felony. The same solicitude to escape *being appealed to Battle*, was the foundation of the chartered privileges of the *freemen* of cities, and of all the exceptions to *Battle* and to *Appeals*, which, instead of being continued in their proper character, as protections to Appellees, are now preposterously and ignorantly converted into encouragements to Appellors, and engines for bringing about second criminal trials! The professed champions of the Saxons, and others, as we have seen, (robust and profligate ruffians, *homes grants et forts*;) in the spirit of the *blood-money men* of our own day, were in the practice of *appealing* those, from whom, or from whose rela-

tions or friends, they believed they could extort money, in order to avoid Battle,—for, to be *appealed*, was to be called upon to fight. Others, vain and confident in their bodily strength, for hire, for malice, for revenge, or upon doubtful or fabricated evidence, appealed innocent persons, and those whose sex, tender age, decrepitude, habits of life, or infirmities, unattied them for self-defence. Against all these evils, society took alarm; and while Appeals remained in the public codes, (the scourge and the disgrace of the community, but protected by the popular prejudices, and by the necessity which sprung from the imperfect state of society,) while Appeals (Appeals to Battle) still remained, every effort was made to repress their mischiefs, or to escape their operation. If we turn once more to the Assises de Jerusalem, we shall find the author busy—not, as in our barbarous days, in devising how an *Appellor*, after calling for Battle, may avoid it—but in devising how an *Appellee* may escape the Battle called for by an *Appellor*. Some extracts to that effect have been given above; and the reader may be referred to the 101st chapter, which treats of “How, on an Appeal of Murder, if Homicide is joined with Murder*, the Ap-

* The definition of *Murder*, as given in the Assises de Jerusalem, and as distinguished from Homicide, has some resemblance to our distinction between *burglary and house-robbery in general*: “Qui veaut faire Apeau de Murdre, il doit savoir que

pellee may avoid Battle;" to the 102d, which treats of "How, on an Appeal of Murder, if the Appellor is not one who can bring an Appeal, the Appellee may avoid Battle;" and to the 103d, which sets forth, "How and why an Appeal of Homecide is hard to be brought to a Battle, if the *Defendant* knows how to frame his plea; and how it ought to be done; and how Battle is to be avoided:"—"Coment et pourquoi l'Apeau d'Omeicide est grief à amener à Bataille, se le *Defendant* s'en sait garder; et coment l'on le doit faire, et coment l'on se doit garder."—To the same source are to be traced the exemptions from Battle in our City Charters—exemptions not designed to enable citizens to *appeal* their fellow subjects, and then, by demurring at Battle, to play the *recreant* with impunity—but to protect citizens from *being appealed to Battle*, for acts alleged to have been done by THEM, *within the walls of their city*.

58. But this third fundamental error is closely

est Murtre, *pour garder soi que il ne se mete en faus gages*. Murtre est quant home est tué de nuit, ou en repos, dehors ou dedans vile;" that is,—“Murder is where a man is killed in the night, or in his sleep, either in town or field.” All other *killing* is homecide, or man-slaughter, more or less culpable.—But in this passage, also, we see, both the peril at which an Appeal of Murder is brought, and that the act of bringing an Appeal is tantamount to offering and incurring gage of Battle.

joined with a *fourth*—that of supposing, that anciently there was an alternative, in trials upon Appeal, between Trial by Battle and Trial by Jury. Doubtlessly, it was competent to any one appealed, to *escape* Battle, by confessing his guilt*; but as to any other mode of Trial than Battle, that would have been, in many cases, to enable the Appellee to elude the effect of the Appeal; for an Appeal is properly (as will be seen) a mode of proceeding where there is no sufficient evidence, or no evidence at all, and where the Appellor demands Battle upon his simple assertion of the guilt of the Appellee, corroborated by such circumstances as shall induce an appearance of probability, but which yet would not justify a verdict of guilty by a Jury.

59. It results from all these alterations of place, and metamorphoses of persons, that what was anciently held to be a hindrance to the allowance or “granting” of Battle, or *permission of Appeal*, to an Appellor, is now made use of to hinder the allowance of Battle to an Appellee. Whatever was formerly held to justify an Appeal, is now urged as a bar to Battle; so completely is it forgotten, that the object of Appeal is Battle.

* I had written this sentence before I read Verstegan; but the reader will have seen that I am supported by that writer to the very letter of my ~~proposition~~.

Anciently if an accuser did not seek *Battle*, he did not *appeal*; but left the offender to suffer, or to go free, by the ordinary course of public justice.

60. It is said, that where there is strong proof of guilt, there should be *no Battle*. True; and what is the reason? Why, because, in such a case, there should be *no Appeal*; but all should be left to the ordinary course of justice!!! Let us see what says the *Contumes de Beauvoisis* on this important part of our question: "In every criminal case, *an Appeal may be made*, that is, *the offender may be brought to Battle*; if the accuser will make a direct charge, (that is, swear to his guilt) as Appeals ought to made; for it follows, that he that is appealed, *must* defend himself by his body, *or* stand attainted of the offence of which he is appealed *. But there is quite another mode of proceeding than by direct Appeal; for, the Appeal (or accusation) being made, the accuser may inform the Judge, (*denoncier au Juge*) that such a misdeed was done, in the sight, and in the knowledge, of so many credible witnesses that it cannot be hidden; and on this, the Judge ought to do as what belongs to a good Judge, and cause an inquest to be taken; and if he finds the mis-

* This, also, (as we have seen,) is the very language of Verstegan, when treating of the Saxon Battle!

deed to be *public and notorious*, he may proceed to sentence according to the misdeed: for it would be a grievous thing, if, a man having killed my near relation *in a public assembly, or amid a crowd of credible witnesses*, I must fight, in order to obtain vengeance; and hence, in such *cases of open crime*, we may proceed by way of indictment (*dénonciation*)*. To some persons it will

* “ Souvent avient es Cours laies que li let ehieent en Gages de Battaile, ou que apensement li un apele l'autre de vilain fet par devant justiche; si est bons que nous en façons propre chapitre, qui ensaigner desquies cas l'en puet appeler, et queles personnes pueent appeler et estre apelés, et lesqueles non, et comment l'en doit fourmer son Apel, et le peril qui est entre tex Apiaux, et lesques Apiaux li Seigneur ne doivent pas souffrir: si que chil qui vouront apeler sachent comment il se doivent maintenir en Plet de Gages, et la fin en quoi il en pueent venir, se il enchieent dou plet.—De tous cas de erieme, l'en puet Apeler, ou venir à Gages, se li acusieres en vient fere droite acusation, selone che que Apiaus se doit fere; car il convient que chis qui est apelés s'en deffende, ou que il demeure atains dou fet douquel il est apeler. Mais il i a bien autre voie que de droit Apel; car ains que li Apiaus soit fes, se chil qui vient acuser vient il puet denoncier au Juge, que tel meffes a esté fes à la vene et à la sene de tant de bonnes genes qu'il ne puet estre eclés, et seur che il en doit fere comme bon juge, et en doit enquerre tout soit che que le partie ne se vueille couchier en enquete, et se il trueve le meffet notoire et apert, il le puet justicier selone le meffet; car male chose seroit, se l'en avoit ocis mon prochien parent en pleine feste, ou devant grant plante de bonnes gens, se il convenoit que je me combatisse pour le vengement poureachier; et pour che puet on, en tex cas qui sont apert, aler avant par voie de denonciation.” *Coutumes de Beauvoisis*, ch. 61.

appear, that this passage is capable of being employed for the refutation of the very Argument which I adduce it to support. But what is its true import? That in every criminal case, there are two modes of proceeding; by *Battle*, or by *Indictment*, (*dénonciation*); by *private* or by *public* suit; and that an accuser is to take *the one* or *the other*. The *private* suit where the act is private and concealed; where he has no testimony but his own assertion; no ground but his own knowledge; no argument but his own word, against that of the offender;—the *public*, where the crime is publicly committed, where its reality is notorious, and where the witnesses of the guilt are abundant;—for the absolute intention of an Appeal (however censurable that intention may be) is to bring to justice an offender against whom there is no evidence that warrants public interference! What, then, does an Appellor do, by showing “violent presumption and strong proofs” of guilt? Why, he shows, that Appeal is not his proper course of proceeding; that Indictment—that the ordinary course of public justice only is fit for him. But shall he be allowed to make his election of the opposite course; to incur the peril of an Appeal where there is no necessity, and then to turn about, and insist on that very “proof,” which is an objection to his Appeal, as a ground of support for that very Appeal—that Appeal, patched and manufactured into what form he pleases—an Appeal

accompanied by so many frightful prerogatives, and bearing so hard upon the accused—and yet divested, at his pleasure, of all peril to himself, and of all hope to him whom he appeals? The passage which I have quoted shows, that an accuser is to take *one* of two courses; but certainly not both. If he thinks he can *prove* a crime, he is to proceed by indictment; if he can say that he *knows* of a crime, which yet he despairs to prove, he may Appeal the offender to Battle*. We see all the misery and confusion of our situ-

* I say, "*knows* of a crime;" for I believe that the law never intended that an Appellor should proceed upon his mere *belief* of a crime, and upon public rumour, with respect to which he stands upon no surer ground than the rest of the world. "Bracton," says Barrington, "an almost contemporary expositor of this statute, [Magna Carta] says, that the Appeal given to a woman is confined to the death of her husband INTER BRACHIA SUA INTERFECTI, SI DE VISU LOQUATOR: the occasion of which restriction," he adds, "seems to be, that when a woman prosecuted, the Appellee lost his right of defending himself by Combat." But the rule, we may suspect, is more general, and *all* Appellants sought to speak of crimes done under their own eyes, but of which they are themselves the only *living* or producible witnesses. The reader must have been shocked at the proceedings in Appeals, recited in these pages, in which Appellors are made to *swear* to the guilt of the Appellees, and not merely to their *belief* of that guilt; and he has, doubtlessly, with the usual self-complacence of our self-complacent times, discovered the apology in the *barbarous forms of antiquity*. Let us not lay that flattering unction to our souls! for here, again, the folly and the shame are ours, and

ation, when we make use of Appeals to procure *second* trials !

61. All exceptions, then, to Battle, grounded on proof of the crime alleged, are properly exceptions to the allowance of an Appeal ; for Appeal proceeds by Battle ; and to allow an Appeal is to “grant a Battle.” To “grant a Duel” or “Battle” is the accurate expression for allowing an Appeal. Such is the expression of the author of *Anti-Duello* * ; and the sensible arguments of that writer go, not to the “unlawfulness” of “granting a Duel,” under the process of Appeal, but to the unlawfulness of *allowing an Appeal*, which is “granting a Duel.” The unfortunate Statute of Henry VII is the barrier which turns aside the due course of justice in Appeals of *Murder* †. By

not those of our predecessors. Cases are easily supposable, in which crimes may be committed in the presence of one only witness—as this of a husband killed in the arms of his wife—or in that of the two thieves (page 174) who committed a robbery together ; and such witnesses are the proper Appellants ; they speak of their own eye-sight and knowledge ; and common sense and common decency are not put to the blush, when we permit such persons to *swear to the guilt* of the accused !

* See above, page 137.

† I presume that I may safely affirm, there can be no second trial obtained by Appeal, for any other felony than Murder ; because, with respect to other felonies, the law remains in its ancient state.

that Statute, and that only, the subject's right to an Appeal, *after* an acquittal on indictment, is created ; and till the offending part of that Statute is repealed, Appeals of Murder cannot regain their ancient and comparatively rational footing. But in Appeals of *Treason*, where the law is not embarrassed by the *private* right, the plain sense and plain justice of its aim instantly breaks out. "When, upon the exhibit of the bill in Court, before the Constable," says the *Anti-Duello*, "the Apellant *failes in the prooffe of his Appeale, and cannot by witness, nor any other manner of way, make his demands appeare*, he may offer to make proof of his intent upon the defendant with his body by force ; and if the defendant will say, he will so defend his honour, the Constable, as vicar-general in armes, (for so is my author) hath power to join his issue by Battle." And here is the explanation of a fact upon which some false reasoning has lately been founded. "The last Wager of Battle in a case of *treason*," says a correspondent of the *Courier* newspaper, "was that of Lord Rea and Ramsey, in 1631, in the Court of Chivalry ; but even in this Court, the proceeding was too monstrous to be permitted to be drawn to a conclusion ; and after a great deal of formality, the King dismissed the whole proceedings, upon grounds which clearly show, *in what cases only Battle* should be allowed, 'because,' said he, 'though, *upon want of good proof*,

the Combat was necessarily awarded ;' yet, being afterward satisfied of the truth by other means, he quashed this mode of trial." The writer does not advert to the distinction between Appeals of *Murder* and Appeals of *Treason*, for which latter offence there can be *but one trial*;—for the Statute of Henry VII is silent upon offences against the Crown, as well as upon all felonies except Murder; and it is one of the many estimable features of the Law of Appeal, as it at present stands, that while, for offences which immediately affect a whole community, there can be *but one trial*, for offences which immediately affect individuals only, there may be *two*! If one man offends against the state, the Verdict of a Jury for his acquittal is all-triumphant; but if a Jury acquits another upon a private and comparatively trifling charge, the Verdict of a Jury goes for nothing! In the case of Lord Rea, the person whom he accused could have but one trial; if Lord Rea chose to proceed upon his own assertion only, the course by Battle was open to him; but if further and sufficient proof subsequently appeared, it was but moral justice to his Lordship, to release him from the obligations of his Appeal (challenge to Battle). The writer whom I quote does not say that any other and subsequent proceedings were had; but we ought to question the *legal* justice of the transaction, if it were shown, that after Appeal had, and

gages tendered and received, the Appeal had gone off, and Mr. Ramsay had been subjected to another mode of trial. The King seems to have been placed in a situation in which he could do no other than pass by the offence imputed to the Appellee. The writer does not perceive, that when the King “quashed” the Trial by Battle, in so doing, he “quashed” the Appeal.

62. As we have just had occasion to distinguish between Appeals of *Murder* and Appeals of *Treason*, and as we have lately seen that Appeals anciently lay in all *criminal* cases, we may here cite the account of the occasions on which, according to the Assises de Jerusalem, the Appellee *could not escape from his Appellor without Battle*. It will thus be seen, that Trial by Battle always extended to *civil* as well as to *criminal* cases; and likewise, that the vindication of a man's *honour* is always the leading intention of Battle:—

“ Ce sont les choses de que il y a Bataille par l'Assise ou l'Usage dou Royaume de Jerusalem, dequoi l'on ne se peut deffendre par esgart ou par connoissance de Court sans Bataille.

“ De Murtre aparant Murtre en Court.

“ De Traison aparant.

“ D'Omeicide aparant Murtre en Court.

“ De Querele d'un marc d'argent ou de plus.

“ De atraite contre son Seignor chose que à son Fié ne soit.

“ Et de toutes autres choses qu'on pert vie ou membre, ou son *honor* qui en seroit attaint ou prové en la haute Court*.”

63. But if, descending from the true fountains of our knowledge, we permit ourselves, for a moment, to take into our view the *exemptions* from Battle, on the part of Appellors, on account of presumed “strong proof” of guilt in the Appellees, such as they are said to have been occasionally admitted in modern Courts, or at least held by modern lawyers; even here we shall have the satisfaction to find, that nothing, on this head, so unsound as that which we see contended for on the present occasion, has ever yet received the sanction of the English bench, or been described or contended for by law writers. “If the Appellant,” says Pulton, “have any vehement presumption, or sufficient testimony, to prove that his Appeale is true, it will be a good counterplea, and sufficiently serve him to put the Appellee from his Triall by Battell: as, if the defendant were indicted of this felony before the Appeale commenced, or was taken with the mainour†, or was taken with a bloody knife, or other weapon, over the body of him that was slaine, or neere unto him, whereby there was ve-

* Assises de Jerusalem, Ch. lxxxi.

† This term is borrowed from charges of robbery, in which the mainour (Fr. *manier*, i. e. *manu tractare*) is the thing taken away.

hement suspicion that he killed him; or that the defendant did lie alone in the house with him that was killed; or that he and others did lye in the house with him that was slaine, and received no blows or wounds in his defence; or that hee made no hue and cry after the theeves, or murderers, to apprehend them; or that he will not confesse which of those which were in the house with him did kill the man that was slaine, or committed the felony that was done; or that he received the man that was slaine into his house, which was seene to go in alive, and after was found dead there, and no means proved how he came to his death *.” So, again, according to other writers, “In Appeals, the Trial by Battle is at the Defendant’s choice: but if the Plaintiff be under an apparent disability of fighting, as under age, maimed, &c. he may counterplead the Wager of Battle, and compel the Defendant to put himself upon his country: also, any Plaintiff may counterplead a Wager of Battle, by alledging such matters against the Defendant, as induce a violent presumption of guilt; as, in Appeal of Death, that he was found lying upon the deceased, with a bloody knife in his hand, &c. for here the law will not oblige the Plaintiff

* Pulton, *De Pace Regis et Regni*, p. 194. How deceitful all these grounds of suspicion may be, the reader needs not to be reminded. Many illustrative anecdotes might be related.

to make good his accusation in so extraordinary a manner, when, in all appearance, he may prove it in the ordinary way. It is a good counterplea of Battel, that the Defendant hath been indicted for the same fact; when, if Appeal be brought, the Defendant shall not wage Battel*." Let us now look at the modern exaggerations of these doctrines, as proposed amid the usual common-places:—"The reason given in the old law books for this strange proceeding by Duel, furnishes, in itself, the strongest ground by which the Appellee's right may sometimes be defeated. The Appeal and Trial by Battel were allowed in cases where there was an absence of all direct proof, as to the person who had committed the crime in question. For instance, a murder was perpetrated: the author was unknown: A. B., being next of kin to the murdered person, presented himself, and swore that C. D. had committed it: C. D. denied it; there was no proof, but only positive affirmation on one side, and positive denial on the other. In a case of this difficulty, where detection seemed impossible by human means, the superstition of our forefathers stepped in with a remedy: they conceived, that if the two men, the Appellor and the Appellee,

* 2 Hawk. P. C. 426, 427. *Jacob*. The reader sees, that all this really applies to no Appeals but such as are brought *before* trial by indictment.

were fairly pitted against each other, without human aid, and under the solemn invocation of the Divine superintendence, then Providence itself would interfere, and, by the result of the Combat, furnish a verdict, (as they termed it,) which should punish the guilty and clear the innocent. This, then, being the motive of the proceeding, it seems clear, that in all cases, where either direct proof could be adduced that the accused was connected with the crime, or where, in the absence of direct proof, sufficient ground of suspicion arose from collateral evidence, to afford matter for an indictment, then the person charged was not to have his Trial by Battle; or in other words, the interposition of Heaven was not to be unnecessarily invoked, where human sagacity might unravel the knot. Whether the present case of Thornton comes under this description is the great point to be decided: and, *prima facie*, we cannot but express an opinion, that the verdict of a Coroner's Inquest, and the subsequent finding of a Grand Jury, though they do not amount to positive proof, at least supply the other requisite in a counterplea—the existence of “vehement suspicion.”—Further, the actual counterplea of the Appellant, in the case referred to in the last quotation, attempts to oust the Appellee of his Battle upon the plea of violent “presumption and strong proofs:”—

“ And the said William Ashford saith, that the said Abraham Thornton ought not to be permitted to wage Battle in this case, because he saith, that before and after the time of issue of this Appeal is brought, there were, and still are, the following violent presumption and strong proofs, that he, the said Abraham Thornton, is guilty of the said murder in the Count so charged and alleged against him, to wit, &c.

64. The writer just quoted is perfectly correct where he observes, that “ the *Appeal* and Trial by Battle were allowed in cases where there was an *absence* of all direct proof as to the person who had committed the crime in question ;” and we have seen that the *presence* of direct proof is equally an argument against *Appeal* and Trial by Battle, if, indeed, we must still separate things which are *essentially* inseparable. But after this, what are we to make of the words “ strong proofs,” which are now, apparently for the first time, foisted into the counterplea of an Appellant? Are there three things—direct proof—strong proof—and violent presumption?—or, after *direct proof*, is there another alternative than *indirect proof*?—and this *indirect proof*, is it any thing else, however *strong*, than “ violent presumption?”—and is not the phrase “ violent presumption and strong proofs” a wretched tautology in composition, and a mischievous imposture in fact?—“ Violent presumption,” then, is all upon which the Appellor has to stand. And what are the grounds of the “ violent presump-

tion" which he adduces? Do they correspond with those held out as examples by even modern law authorities? I do not, here, ask the reader to go back to the days of plain understanding enjoyed by our earlier ancestors, but am content to stay by the modern commentators—impure and embarrassed as is their doctrine. What, then, is the "violent presumption" set out by Ashford? A dead body is found, under circumstances which excite a suspicion of murder. This is one gratuitous assumption; for the deceased may not have been murdered. Further, there are grounds (strong grounds unquestionably) for *suspecting*, that if a murder was committed, it was committed by the person accused. But where are the facts which connect the accused with the murder? Where are those grounds of "violent presumption," which, even according to the commentators, ought to oust the Appellee of his Battle? An Appellee, they tell us, may be ousted, 1. If he were indicted of the felony before the Appeal commenced. Now, let it never escape us, that this refers to a single criminal trial only—an indictment found, but not tried—and then, the reason why, under such circumstances, he may be ousted of his Battle, is—that there exists that "direct proof" which has already induced a Grand Jury to find a bill against him! Here, then, we rest upon the *terra firma* of "direct proof," and have nothing, fortunately, to

do with the quagmire of “*strong* proofs,” of notable modern contrivance! But the Appellant may be ousted of his Battle, 2. If he is taken with the *mainour*, or was taken with a bloody knife, or other weapon, over the body of him that is slain, or near unto him, &c.” Now, what is there, in the case of Abraham Thornton, which affords “violent presumption,” of the kind here pointed out?—How much misconception runs through the general argument of the writer quoted, will be obvious to the reader who has accompanied us through the preceding pages; but the concluding proposition must not be silently dismissed. The writer, with laudable candour, admits, that the verdict of a Coroner’s Jury, and the subsequent finding of a Grand Jury, “do not amount to *positive proof*”—but adds, that they at least supply the other requisite in a counterplea—the existence of a “vehement suspicion.” The writer omits to tell us, whether he does not think the finding of *not guilty*, by a Petit Jury, a tolerable rebutter of the “vehement suspicion” which he brings forward! The acquittal by the Petit Jury (the Coroner’s Jury and Grand Jury hear only the evidence *against* a prisoner) is, by the Statute of Henry VII, no bar to the *Appeal*; but if the *Battle* is to be refused on account of the “vehement suspicion,” arising from the verdict of the Coroner’s Jury, and the finding of a Grand Jury;

surely the “vehement suspicion” which rests upon those *non-pleadable grounds*, is amply counterbalanced by the equally non-pleadable ground of acquittal by a Petit Jury—a solemn verdict of “God and the Country,” pronounced after the hearing of evidence on *both sides**!

65. But other grounds for exemptions from Battle, in behalf of Appellors, are found in the *natural conditions* of persons. Here, again, we shall cite the commentators—but always protesting against a too facile reception of what they advance, and always requiring of the reader to verify their law, word by word, with the original

* We have seen, too, (in an earlier part of this Argument) that the *opinion* of the Judge who has tried the prisoner on the indictment, goes for much in determining the voice of the Court, when called upon to receive the Appeal. Now, if rumour is not deceitful, Mr. Justice Holroyd has never concealed his opinion, that the verdict given by Abraham Thoruton's Jury was satisfactory; and the report appears to be justified by the tenor of the Learned Judge's charge, as stated in the newspapers.

The satisfaction of the Learned Judge may possibly stand on other grounds than his private opinion of the prisoner's guilt; for it is one thing to *believe* a man guilty, and another to *prove* him so; and Juries, upon matters of fact, are to act upon the *evidence*, and not upon their *belief*; they are to tell the Court, not what is their *fancy* of the guilt or innocence of a prisoner, but what, upon their oaths, they *believe* has been *proved*. But, if rumour is not again deceitful, the Prisoner's Counsel also, are at this time really and inwardly persuaded of his innocence.

writers. Where a woman is the Appellant, (which she can be only in the solitary case of the murder of her husband) the Appellee cannot defend himself by Battle, but must submit to Trial by Jury, even where he has been tried by Jury before. But Pulton adds other cases :—“ Vehement presumptions of the Appellant’s infirmities, or weaknesse, are sufficient barres to exclude the Appellee from Trial by Battell with him. As, if the Appellee be within the age of foureteene yeeres, or above the age of threescore and tenne yeares, or within orders, or a woman, or be maihemed ; whether he were maihemed by the Appellee, or by any other. And some do hold it for lawe, that if the Appellant be above the age of threescore yeares, the Appellee shall no more Wage Battell against him, than against an infant within age, or a woman*.” The same author, though doubtfully, puts the case of an infant Appellor in such a manner as to induce a belief of the ancient anxiety of the law to preserve to the Appellee

* *Pulton*, p. 195. So, also, Sir William Standforde—“ Et nota, que come vehement presumptions del culpablenes del defendaunt, sont causes a ouster le defendaunt de son Tryal per Battayle ; issynt vehement presumptions del infirmitie ou imbecillite de l’Appellaunt, seront bones causes à ouster le defendant de son Trial par Battaile, come appiert per Britton, fo. 49.” The sense and truth of the matter is, that these infirmities in the Appellor, bar the Appeal, and *therefore* bar the Battle.

his right of Battle: "An infant within the age of twentie and one yeares may have an Appeale of the death of his ancestor, (and in like sort he may have any manner of Appeale): but, notwithstanding, the plea shall remaine to be tried, untill hee come to his full age of one and twentie yeares; *for that in this case, the Defendant cannot Wage Battell against him: Attamen quære.*"

62. To all this, I shall only reply, That every denial of Battle *to the Appellee* is a departure from the ancient law; and that modern Courts will certainly be cautious how they enter too freely into the race of degeneracy. An appeal is an application for Battle or *licensed Duel*; Appellants must be told this; and if they do not like the Battle, they must go away without the Appeal. Nobody forces *them* to Appeal; *they* force the Appellee to fight. *They* challenge the Appellee; he *accepts* the challenge, because he has no other alternative than to be hanged, or at least to put himself into much danger of being hanged.—But to the immediate point in hand. By the Norman law, there could be no ousting of Battle, because the very few persons who were exempted from fighting themselves, could only prosecute their Appeal by fighting by their champions, and taking upon them all the risks of the champion's defeat. By the Saxon law, the Appellor's situation was still worse, and the Appellee's still

better. “ The *accused* had the liberty to chuse another in his stead ; but the *accuser* must perform it in his own person, and with equality of weapons*.” The persons who, according to the Assises de Jerusalem, were exempted from fighting, are of three descriptions only ; women, men who are maimed, and men who have passed their sixtieth year†.

66. A third class of exemptions from Battle, in behalf of Appellees, is found—that is, *pretended to be found*—in the *civil conditions* of persons ; but, here, we have the perpetual mistake of applying to the encouragement of *Appellors*, what was intended for the protection of *Appellees*. I repeat it, that the ancient law was always labouring to protect men from *being appealed to Battle*—and not at enabling them to appeal others, at no risk to themselves ! It is thus with the case of *priests*, who, Pulton would persuade us, may oust Appellees of their Battle ;—but the law means, that

* Verstegan, p. 64.

† Assises, ch. cvii.—The good sense of this limitation is palpable, and shows, once more, the aversion of our ancestors from disjoining Appeal from Battle,—and Battle by the Appellor himself. Women, men who are maimed, and men who are past their sixtieth year, can never *grow* fit for Battle ; but the sick may *grow* well, and infants may *grow* older, and “ fight another day.” Accordingly, with respect to these latter, the Battle was not ousted, but deferred.

priests shall not be forced to Battle, *if appealed*. This may be seen in the Grand Coustumier de Normendie; where, however, the *protection* is restricted to *unmarried priests*, and grounded solely on the dignity of the church, which would not suffer her *regular* priests to be thus treated, but which, if a priest married, or laid aside the canonical habit, abandoned him to the weapon of the Appellor. A similar exemption has been set up *for peers of the realm*—but on still worse foundation; for there is nothing to save a peer from fighting, in an Appeal, whether Appellor or Appellee. The King, it is said, cannot be appealed, that is, appealed to Battle;—and this may have been the case with all lords paramount, under the ancient system; but inferior lords might be appealed by their men (*hommes*) or vassals. For the rest, the old law knew of but three civil classes, 1. knights; 2. simple freemen; and, 3. villeins or slaves; now, every freeman was the equal of another, as to the administration of justice: and *so just* were our ancestors, that though there was one description of armour for knights, and another description for sergeants or simple freemen, yet if a simple freeman was to fight with a knight, he was, for that occasion, armed as a knight himself. This is the allusion contained in our last quotation from Verstegan, where he speaks of the “equality of weapons.” A peer of the realm, as I take it, can be known, to the

law-military, only as a knight ; and if, in our day, and under that Law of Appeal which we so much admire, a peer should appeal his valet, or the valet appeal the peer, both must fight, and both be armed as knights*. I am not able to explain, why, under our modern law, no *Appellor* of Felony can fight by Champion, unless it be true, as asserted by Verstegan, that by the Saxon code Champions were allowed to *Appellees* only. In that case, a later rule may have placed both parties on the same level†.

67. A particular instance of legal exemption from Battle, resting on the *civil condition* of the party, is found in the freemen of some, and perhaps all cities, founded on their respective charters ; and a report is abroad, that in the case of Ashford and Thornton, the Appellor, *since* issue by Battle joined, has been made a freeman of London, with the hope of thereby defeating the Appellee's right to Battle. That so despicable a stage-trick could, in any circumstances, under colour of law, obstruct the course of substantial justice, is utterly impossible. The Appellor is already before the Court ; he entered it as a non-freeman, and a non-freeman he must

* According to the Assises, in all Appeals of Death, knights, as well as others, are to fight on foot.

† In writs of right, the Battle *must* be fought by Champions. For the reason, see Blackstone.

remain, as to this suit. But the whole story must be founded in mistake ; for it cannot be unknown to his Counsel, that, as already intimated in these pages, the privilege in question is of a directly opposite bearing to that which such a proceeding supposes. It is a privilege to be able to avoid Battle if appealed ; that is, if the citizen is the Appellee ; but it in no respect takes from the non-freeman his right of defending himself by his body, because he may happen to be appealed by a citizen. If a citizen is appealed, (and apparently, only in the case that he is appealed of a crime alleged to have been by him committed within the walls of his city*), he is not to be challenged to fight, but may discharge himself by his oath, or by the oaths of his neighbours or compurgators ; that is, he may decline Trial by Battle, (*legem manifestam*) and elect that of the Corsued †, or else that of the Wager of Law, (*legem sacramentum*) according to Free Law, (*legem liberam*) or the rights and privileges belonging to *freemen*, as distinguished from villeins, serfs, slaves, or persons in the servile condition. Very different is this from

* Want of leisure has prevented me from referring to the original charter of the city of London ; and that circumstance must apologize for the obscurity of the language in my quotation, at page 124. My inference, as to the restriction of the privilege of citizens, even when appealed, is drawn from the words of the charter of the city of Dublin, (above, p. 126) which I have found quoted in a newspaper.

† See above, page 118.

the extravagant misconception, that a citizen is privileged to appeal his fellow-subjects in his turn, and deprive them of the Trial by Battle—they who have not the benefits of civic freedom—who cannot claim Free Law, but have no alternative but to defend themselves, or to put their lives, at the bidding of the Appellor, into the hands of a Jury. The privilege of citizens is *for* themselves, and not *against* their fellow-subjects, except as the privilege of Free Law is against all criminal suitors, where the citizens are defendants, inasmuch as these latter are enabled to *discharge themselves* upon easier terms than their fellow-subjects*.

* The real import of the civic privilege in question seems to be as little understood, and as little suspected, as are its origin and intention. I submit, here, with more formality than before, (page 125) that under the words of the Charters, every freeman, of cities having such Charters, is equally exempt from *Trial by Battle* on the *appeal* of the subject, and from *Trial by Jury* on any suit of the Crown; but that in both cases, he may discharge himself by Wager of Law, or other ancient custom of the city. The nature of Wager of Law has been explained above; and I risk the question, as one very important to be solved, whether, at the present day, in the city of Dublin, (page 126) for instance, if a freeman is impleaded for treason at the suit of the Crown, the treason being charged to have been committed within the city, such freeman may not discharge himself by the oaths of forty other traitors, but such as, being unattainted, are, in the eye of the law, “good and lawful men;”—whether freemen of cities so circumstanced are not

68. I have now shown, as I think, (and in spite of my fears to the contrary,) the firmness of the

equally protected against Trial by Jury in all other "pleas of the Crown;" whether these fearful privileges do not stand on the same basis as the exemption from Battle at the suit of the subject; and whether it may not be as possible to "surprise" the Courts and country by a Wager of Law, or Gage of Law, in answer to an indictment, as by a Wager of Battle, or Gage of Battle, in answer to an Appeal? These questions appear to me to be so serious, that the hope of their being met by a refutation in point of fact, or remedy in point of law, counterbalances the regret which I should otherwise feel at seeing myself called upon to propose them. It will be remembered that Wager of Law, at the least, like Wager of Battle, is still the law of the land; and that no particular legal enactments, which have been framed for ousting, in special cases, Wager of Law, (though they are good against all the rest of the King's subjects) can stand against the Royal Charters possessed by the freemen of cities; and that no general statute can have any more effective operation.

With respect to the origin and intention of granting this privilege (for it is one privilege) to the freemen of cities, notions equally mistaken appear to prevail. It is said by all authorities, (first the high, and then the low) that it was granted in favour of the unmilitary habits of persons engaged in arts and trade, and sometimes that it was given in homage to the value of such pursuits; a theory upon which is attempted to be founded an argument, by analogy, in favour of an equal exception of all other subjects, in like manner employed¹. But it is to be remembered, first, that the privilege is not a general right, common to all the King's subjects, but a privilege, granted, through special favour, to particular communities of

¹ Even this, however, would show a monstrous perversion, in the attempt to clothe with this character a husbandry labourer!

ground on which Battle stands in our legal code ; the reasonableness of its existence as part of the

men. Next, however, as to the *origin* and *intention* ; and here we shall find, that the unmilitary habits of the freemen of cities are rather the cause of the desire of such a privilege, than that of its being accorded ; while, nevertheless, the policy of our Kings, in encouraging arts and trade, and therefore in founding of cities, was doubtlessly one of the causes why the prayers of those cities, for this exemption from the constraint which it was thought right to impose upon the subjects in general, received the royal attention. We must repeat, that the privilege in question is that of being tried as free persons, (as freemen, distinguished from serfs or slaves) and yet as persons whose notions of honour did not extend to trial by arms ; as *freemen*, but not as *soldiers* or warriors. To understand the matter thoroughly, we must once more (see page 205) carry back our imagination to the time when European society consisted but of two great classes, that is, of freemen and slaves ; when a third class was created by the subdivision of freemen into knights and simple freemen ; when national and personal defence was the noblest, because it was the most important, civil employment ; when trade was limited and insignificant, and when the arts (including the art of husbandry, and excepting only the art of war) were abandoned to the pursuit of slaves. All freemen, under these circumstances, were warriors ; and freemen, at this time, and indeed at all others, had a law of their own. In matters of controversy, they were to be believed on their oath ; and this high privilege was supported by the magnanimous and concomitant provision, that they might always be called upon to prove or defend their honour by their lives ; by Trial by Battle. It was under the same circumstances of society (as I suspect) that the other ancient modes of trial, commonly called Ordeals, sprung up ; modes of trial in which the accused was neither permitted to

Law of Appeal; and the rarity of the cases in which, upon Appeals, it can be denied to the

defend himself by his body, nor to discharge himself by his oath. In the rudest times, there was a numerous portion of society, including women, priests, the young and the aged, the sick, the blind, the lame, and the whole population of slaves, who could not defend themselves by Battle; who, therefore, had no claim to be believed on their oaths; and the greater part of whom were not allowed to offer them. Priests were excepted, because that was accorded to their sanctity, which was yielded to freemen as due to their honour; and hence, what the law calls *canonical purgation*, in contradistinction to the *vulgar purgation*, or trial of the common people, of which we are presently to speak. Serfs or slaves, on either hand, could have no trial by arms nor by oath, because they had neither military, civil, nor religious character, to justify such an indulgence¹. Thus, then, there were three classes of trials for society at large; Battle for *freemen*, oaths for priests, and fire and water for women, infirm persons, and slaves. But, by degrees, the arts of peace increased in estimation; their professors rose in the scale of society, and were privileged for their encouragement; and, on this occasion, a *new class of freemen was created*—freemen, not by birth and landed tenure, but by Charter—freemen not warlike, but composed of arti-

¹ Slaves can never be allowed to give testimony on oath, that is, to be lawful witnesses in the judgment of Courts or Legislatures, because, among other reasons, they are not masters of themselves, nor citizens of the state. They are exposed to the influence of love or fear of their masters, and therefore are fit neither to be witnesses *against them* nor *for others*. Further they are not fit to be witnesses for nor against any other persons in the community, because they may be influenced by their masters, or against their masters, though their masters are not immediate and apparent parties in the suit. These are legal objections to the testimony of slaves, wholly independent on those others which are either political or moral.

Appellee. But, as it will not be imagined that I am more of a friend to this mode of Trial than any other person, at this day, can be, the reader will be prepared to expect of me, that I should tell him in what way Trial by Battle is really to be got rid of. This is done in a word, and in an instant—bring no Appeal. If, on the other hand, and in the present state of the law, Appeals are brought, let the Courts, as often as possible, award

zans and traders. Now, these freemen had their *Free Law*—they were raised above the modes of trial belonging to *slaves*, because they were *freemen*—and they did not aspire to the honours of Trial by Battle, because they were not warriors, but artizans or traders. Their privileges, therefore, were assimilated to those of the clergy—though they were still kept at an humble distance even from these—they were men of peace, but not men of sanctity—and consequently, while the priest was permitted to discharge himself by his single oath, the lay citizen was obliged to produce his neighbours, who were to swear that he was worthy of being believed on his oath. This is Wager of Law; this is its foundation, as a privilege of freemen of cities; and this is the privilege which stands opposed to Trial by Battle at the suit of the subject, and Trial by Jury at the suit of the Crown.

Blackstone (see above, page 117, note) seems to suppose, that Wager of Law stands in opposition to Wager of *Battle*; as if *Battle* were not *Law*. But we have now repeatedly seen, that the *laws*, or modes of trial are many, and that *Battle* (*legem manifestam*) is one of them. Wager of Law is merely a popular name. Oath *Law* (*legem sacramentum*) is the true one, and this stands opposed to Assise *Law*, (or Trial by *Jury*) as much as to Trial by *Battle*.

the Battle,—in order, not to produce, as far as their wish is concerned, the fighting of the parties—but in order *virtually* to nonsuit the Appellor*. Like another Portia, the “righteous judge” will have no difficulty in giving judgment. “The Jew must have his bond;” the Appellee must have his “pound of flesh;” but let him take it subject to the “law of Venice,” or let him depart the Court †.

* This was the case in the latest award of Battle, *in an Appeal of Felony*, of which I find any record; namely, in that of Read and Rochforth, 1555. “This,” says a writer, “was an Appeal of Death: the Appellee waged his Battle; the Appellant demurred, that is, denied that such a plea could be legally offered; the Court decided against the demurrer, and of course the plea was sanctioned, and the Appellee discharged.” The writer does not add, (what is of the last importance to the equitable view of Appeals) that in this, as in another case which he has cited, and where the fact gained his attention—THERE WAS NO TRIAL ON INDICTMENT BEFORE THE APPEAL. Indeed, the practice of bringing Appeals after acquittal, seems even a modern abuse of the power granted by the Statute of Henry VII. Like the Jew in the play, the modern Appellee *sticks by his bond*, with a deaf ear to the merciful suggestions of the jurisprudence of his country. To all these, he answers, “Is it nominated *in the bond*?” The reader will see the case of Read and Rochforth, as reported by Dyer, in the Appendix, No. II.

† I cannot but seriously recommend to the reader, an attentive perusal, at this moment, of the following extracts from the works of that immortal man “who walked in every part of

1 Merchant of Venice.

69. How to get rid, at least by a palliative, of
Wager of Battle, is sufficiently shown us by our

human life," and who is as fit to instruct us in the Court and
in the Council-chamber, as in the fields and in the closet:—

MERCHANT OF VENICE. Act IV. Sc. 1.

Portia. Why, this bond is forfeit;
And lawfully by this the Jew may claim
A pound of flesh, to be by him cut off
Nearest the Merchant's heart:—Be merciful;
Take thrice thy money; bid me tear the bond.

Shylock. When it is paid according to the tenour.—
It doth appear, you are a worthy Judge;
You know the law, your exposition
Hath been most sound: I charge you by the law,
Whereof you are a well-deserving pillar,
Proceed to judgment: by my soul I swear,
There is no power in the tongue of man
To alter me: I say here on my bond.

Antonio. Most heartily I do beseech the Court
To give the judgment.

Portia. Why then, thus it is.
You must prepare your bosom for his knife:

Shylock. O noble Judge! O excellent young man!

Portia. For the intent and purpose of the law
Hath full relation to the penalty,
Which here appeareth due upon the bond.

Shylock. 'Tis very true: O wise and upright Judge!
How much more elder art thou than thy looks!

Portia. Therefore, lay bare your bosom.

Shylock. Ay, his breast:
So says the bond;—Doth it not, noble Judge?—
Nearest his heart, those are the very words.

statute-books, which have done as much for Wager of Law. Battle cannot be waged upon an indictment, because no man can offer to fight the King, who prosecutes for his people. In like manner, Law or Oath cannot be waged in private suits, under circumstances which have been contrived, and of which Blackstone gives us an

Portia. It is so. Are there balance here, to weigh
The flesh?

Shylock. I have them ready.

Portia. Have by some surgeon, Shylock, on your charge,
To stop his wounds, lest he do bleed to death.

Shylock. Is it so nominated in the bond?

* * * * *

Portia. A pound of that same merchant's flesh is thine;
The Court awards it, and the law doth give it.

Shylock. Most righteous Judge!

Portia. And you must cut this flesh from off his breast;
The law allows it, and the Court awards it.

Shylock. Most learned Judge!—A sentence; come, prepare.

Portia. Tarry a little:—there is something else.—
This bond doth give thee here no jot of blood;
The words expressly are, a pound of flesh;
Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

Gratiano. O, upright Judge!—Mark, Jew;—O, learned Judge!

Shylock. Is that the law?

Portia. Thyself shall see the act;
For, as thou urgest justice, be assur'd,
Thou shalt have justice, more than thou desirest.

account. I do not mean, however, that the freemen of cities chartered accordingly, can be ousted of their Wager of Law, on any suit of the King, nor on any Appeal of Felony. Further, it may be of great importance to understand, that the freemen in question are *excused* from Battle, and not *debarred* from it. If appealed, they may wage Battle; if they are appealed of felonies committed within their city, they are *excused* from Battle *and from Jury*, and may discharge themselves by Wager of Law*.

70. "Wager of Law," says Blackstone, "was never permitted, but where the defendant bore a fair and irreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: and many other prudential restrictions accompanied this indulgence. But at length it was considered, that (even under all its restrictions)

* We see, now, in what manner we are to understand *excuse* from Battle. "Persons excused from Battail," says Sir John Davies, "I. Clergymen: and therefore 42 Eliz. lib. cor. 99. an Appellee, when he came into the field, avoyded the Battail, by praying his clergy. II. Cityzens de Londres per charter del Citty. III. Sexagenarii."—Yes; these persons are "excused from Battle," but in what circumstances? WHEN THEY ARE APPEALED. Can any of them be forced upon a Jury? Citizens of London CANNOT.

it threw too great a temptation in the way of indigent or profligate men : and therefore by degrees new remedies were devised, and new forms of action were introduced, wherein no defendant is at liberty to wage his Law. So that now no plaintiff need at all apprehend any danger from the hardness of his debtor's conscience, unless he voluntarily chuses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore one shall hardly hear at present of an action of *debt* brought upon a simple contract : that being supplied by an action of *trespass on the case* for the breach of a promise or *assumpsit* ; wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt. And, this being an action of trespass, no Law can be waged therein. So, instead of an action of *detinue* to recover the very thing detained, an action of trespass on the case in *trover and conversion* is usually brought ; wherein, though the horse or other specific chattle cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel ; and for this trespass also no Wager of Law is allowed. In the room of actions of *account*, a bill in equity is usually filed : wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff ; but he may prove every article by other evidence, in contradiction to what the defendant has sworn.

So that Wager of Law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, 'in which no Wager of Law shall be allowed:' otherwise a hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it*." By a similar indirect method, Wager of Battle may, for the most part, be removed.

71. But still, to bring, or not to bring an Appeal, is at the discretion of the subject, who may even, by Appeal, prevent Trial on Indictment, and thus induce Battle. This rests, not with the Courts below, but with Parliament, on which alone, of course, it depends, whether Appeals shall or not continue to be lawful, and without any modification, of one kind or other.

72. The common opinion is, that Battle should

* Sir Matthew Hale, however, is of opinion, that the disuse of Wager of Law has the inconvenience of multiplying suits. "For when men were sure, that in case they rested upon a bare contract without any specialty, the other party might Wage his Law, they would not rest upon such contracts, without reducing the debt into a specialty, if it were of any value; which created much certainty, and accorded many suits." *Hale's Common Law*, ch. viii.

be done away with, but Appeals (and, absolutely, second criminal trials) continued; but I apprehend, that, independently on the philosophical and historical argument (for second criminal trials are intolerable, and Appeals are Appeals to Battle), there are powerful and constitutional objections to this course. I apprehend, that Magna Carta does *not* protect the right of Appeal, but that it does protect Trial by Battle, in the same degree in which it protects Trial by Jury*.

73. How little the loss of the process by Appeal would be matter of regret, considered as part of our municipal law, and as conducive to the administration of justice, ought already to have appeared in these pages. It has been seen,

1°. That it is, in fact, no other than an application for a **LAWFUL DUEL**; a mode of deciding questions in dispute between the subjects of the

* I rejoice to find, that in the construction which, against the authority of so many great names, I have ventured (page 126, note) to give to the words of Magna Carta, (*per legale judicium parium suorum*, &c.) I am supported by Sir Matthew Hale, who thus gives the purport of the passage: "The effect of which is, that no man shall be put out of his lands or tenements, or be imprisoned by any suggestion, unless it be by indictment or presentment of lawful men, **OR BY PROCESS AT COMMON LAW.**" *Hale's Common Law*, ch. iii.

state, from which civilization turns with abhorrence*.

2°. That it originated in times and under circumstances when *public* justice had no existence, and when *private* justice necessarily supplied its place.

3°. That after the establishment of public justice, it was continued, because, among other reasons, there are cases of *guilt which cannot be made out by evidence*—which may be known only to the prosecutor himself—and which, upon a principle not now to be endured by any reasoning mind, or from a necessity which the weakness of the law was obliged to connive at, it was permitted for the prosecutor to attempt to establish, *at the peril of his body*. A principle which is at direct variance with the acknowledged maxim of our law, and the constant sentiment of our mouths, that in every doubtful case, justice should lean to the accused, and that it is better that an hundred offenders should escape, than that one innocent person should suffer†. A

* This is the argument of the Anti-Duello, which book might be better entitled, The Anti-Appellist; but that Appeal and Duel, Combat or Battle, are really the same thing.

† “The Judges cannot be ignorant of what is prescribed to them by good law, to wit: That in every doubtful case the accused ought to have the advantage, and that he must pronounce in his favour.” *Anti-Duello*.

principle, in short, which, in its ancient practice, places every innocent person at the disposal of every wicked, or infuriate, or obstinate, but bold and strong man; and, in its modern, at that of every unprincipled mistaken person, even though without the virtue of personal courage.

4°. That the possibility of converting the process of Appeal into a *second* criminal prosecution, is an abuse of the ancient law, arising out of nothing higher nor more invulnerable than the unfortunate, though excusable, Statute of Henry VII^e.

5°. That the alteration of the law by the Statute of Henry VII, is only one instance of the existing departure from the original practice; a departure so decided, and so malignant, that what was at first only barbarous, is now absurd, wicked, contrary to all civilized legislation, and inconsistent with the most obvious and undoubted constitutional rights of Englishmen.

* We are never, in this view, to forget, either the general inducements to the best practicable alteration of the law, as it stood at the accession of Henry VII, nor the particular motives for such an alteration, and at such a time, and in such circumstances; that is, amid the civil divisions arising out of the respective claims of the Houses of York and Lancaster. In these views, let the observations of Lord Bacon (page 12, note) be once more referred to.

6°. That the application of the Statute of Henry VII to the purpose of procuring a second criminal trial, or, in other words, to the purpose of a private prosecution for murder, *after* an acquittal by “God and the Country,” though practicable under the letter of the Statute, is a gross violation of the spirit of our whole criminal code; and though the Courts, as well as the country, are bound to submit to the letter of the particular Statute, yet their opinion on the merits of its operation, and on its claims to favourable interpretation, should be formed on the spirit of our general jurisprudence, and on its harmony therewith. The advisers of the provision of Henry VII acted upon no abstract view of right, but in reluctant obedience to the iron mandate of the case. Those who shall extend its influence, will circumvent, not assist, the pursuit in which they were engaged.

7°. That the longer continuance of the Law of Appeal of Murder in its present state is equally to be deprecated, whether we consider its operation upon the rights of natural private prosecutors, or upon the rights of the prosecuted. The rights of natural private prosecutors, against which, if they deserve to be countenanced and preserved, it sets limits with equal arbitrariness and injustice*; and the rights of those who are pro-

* We have considered, in a previous part of this Argument,

secuted for murder, and whom it deprives, I. Of the previous inquiry of a Grand Jury, and even

(page 27), some of the various restrictions upon the right of Appeal, and the list is still further extended by Pulton: "There be some other pleas in barre in an Appeale, which bee generall, and will serve for all manner of Appeales of Felony; as, to plead, that the plaintife is attainted of treason or felony; or that he is a monke or *priest*, not of perfect memorie, dumbe, deafe, a *lazar*, a natural foole, or that he is mayned by another, and not by the defendant." *Pulton*, p. 168.

We are to repeat, here, the observation, that the explanation of these restraints is, that the Law of Appeal has no reference to *public justice*, and that it yields only perforce, and with the least latitude possible, to barbarous private rights. But, further, if it be true, that a *priest* cannot bring an Appeal, this fact not only confirms the view we have taken of the meaning of *excuse* from Battle, (page 215) but helps to show, in a general way, that the ancient laws always intended to deny, to those who could not join issue by Battle, the right of bringing an Appeal, that is, of *challenging* to Battle. The justice of such a prohibition would stand on a different footing, while, (if at any time it were so) a priest, &c. could fight by his *champion*; but after the disuse of champions (supposing them to have been so employed) it can no longer be questionable.

It is observed above (page 55, note) that a distinction still more nice than any that has hitherto been mentioned, is made by our laws, as to the rights of Appellors: it is, that as a woman cannot appeal, except of the death of her husband, so an *hermaphrodite* heir is capable or incapable of appealing, accordingly as the one or other sex is held to prevail. The reader will probably only laugh at this distinction, unless he is wise enough to discern in it a new proof of the anxiety, at times, of the Courts to get rid of *private* prosecution—of the *English* Courts to escape from our barbarous Norman and Saxon Ap-

of any ordinary magistrate*; and, II. of the right to share, in the event of condemnation, in the

peals of Murder, and of Henry VII's second criminal trials — and also a new proof, that not *public justice*, but a submission *nolens volens* to the private right, is the principle of the Appeal of Murder.

* Sir John Hawles, (page 64, above) and after him, (as we shall see) Mr. Horne Tooke, have observed, that the intervention of Grand Juries is not provided for in Appeals, or suits for capital offences on the part of the *subject*; and have thence inferred, that Grand Juries were not (as is usually said) instituted *in favorem vitæ*, or for the general protection of accused persons, but exclusively for the protection of persons accused by the Crown, as by indictment; and have hence gone on to contend, that *ex officio* informations for libels, and the consequent absence of the finding of a Grand Jury, is a violation of the constitutional rights of the subject; but had the historical information and political acumen of these gentlemen been larger and greater, they would never have held such an argument, either as founded on fact or on reason.

That the office of Grand Juries is to inquire between the Crown and the subject, and that it have no cognizance of the Appeals of subject against subject, is acknowledged; but the reasons are exceedingly different from those suggested. In the first place, Appeals, that is, the natural right of private redress, existed before Grand Juries; and, on the foundation of public tribunals, and the assumption of the administration of justice by the sovereign, the new system was framed, not to carry into effect the old practice of Appeals, but the new practice of Indictments. To this new system belong Grand Juries, and their office is at once in favour of the public peace, and the liberties of the subject; and it is hence, that as far as the Crown is concerned, Grand Juries act *in favorem vitæ*.

common mercy and justice of the Crown; and whom also, (taking out of the pale of the general

Grand Juries have nothing to do with Appeals, for this plain and sufficient reason, that Appeals are not the suits of the Crown; but only an ignorance of the history of Appeals, and their abuses, can betray us with a belief, that from their absence in these suits, the absence of the principle, in our law, of an inquest *in favorem ritæ*, is to be inferred.

The very nature of an Appeal, conducted on its true principles, (and the admission, right or wrong, of which principles, has been *one* of the reasons of the continuance of Appeals, after the establishment of a system of public justice) excludes, in great measure, the right of interference, either of Grand Juries or *Petit Juries*. Appeals were originally intended, by our laws, for cases in which there is *no evidence* to go to a Jury; cases in which the Appellant has nothing, or little more than nothing, to offer, but his own assertion; where he pretends to accuse on his own knowledge.—I have already expressed my suspicion of this fact; and that suspicion I find amply confirmed by Pulton.

It is obvious, that in these cases of accusations made upon the personal knowledge of the accusers only, Juries of either description must be out of the question. As Juries are to act upon evidence, they must, in cases where there is little or no evidence, for the most part, release the accused. To meet this difficulty is the very purpose of Appeals, properly understood; and the only true question that arises on them is, whether the principles on which they rest deserves to hold a place in the science of legislation. It is certain that many cases of guilt arise, in which, for want of legal, and even of human evidence, the accused must be acquitted. In these cases, the ancient Law of Appeals assumed, that it would be a proper middle course, between letting an offender too easily escape, and the danger of convicting an innocent person upon false or insufficient evi-

liberties, and the protection of the community, the laws and the constitution) it places at the

dence, to let the two parties settle the question of their respective pretensions to veracity (the one affirming and the other denying) by the Battle to which their *quarrel* so naturally led. The whole argument of the Anti-Duello is against this principle of law; that writer contending, (according to the usual sentiment of modern times) that where there is no *sufficient* evidence of guilt, human justice ought not to hunt about for by-ways of reaching the accused person, but take the open and safer path of totally discharging him¹.

Such is the true principle of Appeals; and yet so far was the ancient and rational law from rejecting, even in respect of Appeals, the principle of a previous inquest *in favorem vitæ*, that we find the most frequent and the strongest authorities for regarding that principle, and its practical application, as essential parts of the law by which Appeals have been and still ought to be regulated. The laws of Normandy, as we have seen, require, *information précédente*, before allowing an Appeal; the Assises de Jerusalem require, 1. proofs of a murder to be shown; and, 2. the grounds of suspicion against the accused to be inquired into: the Customs of Beauvoisis (page 197, above) speaks of the Appeals which the lord or sovereign ought, and the Appeals which he ought not, to allow: all the books are full of the perils attending Appellors, that is, not merely the perils of Battle, nor the perils of false Appeals, but the perils of mistaken or irregular Appeals;—perils wisely created *in favorem*

¹ In the beginning of the seventeenth century, when Trial by Battle has appeared to have excited peculiar attention in England, it was in Appeals of *Treason* that it was chiefly resorted to; and here the writer almost reluctantly gives up the practice. For, according to him, it is of great importance to the body politic, that *informers* should be able to bring traitors to justice, even when they cannot prove by witnesses their offences.

entire disposal of the private prosecutor—a prosecutor who, through passion or worse motives,

ritæ, that is, to preserve innocent persons, not only from malicious, but erroneous prosecutions;—and, lastly, Magna Carta (page 123, above, note) promises to protect the subject against being appealed to Battle upon the simple assertion or affidavit of the Appellor.—The comparison, indeed, of the words of Magna Carta, with those of Pulton, just alluded to, suggests an inquiry as to the real amount of the provision of the statute of Gloucester, cited by that writer, and whether its object was not to confirm the intention of Magna Carta, by prohibiting the allowance of Appeals, till after the Court shall see, by witnesses, the grounds of the charge against the prisoner, or otherwise be satisfied of the reasonableness of the Appeal.

The just attention which was paid to the rights and situation of the Appellee appears from various sources. In the Assises de Jerusalem, (page 99, above,) we have seen the lord sending *a Court* to view the body of the person said to be wounded, and even to converse with the prisoner. Various similar passages might be cited, and their liberal tenour would encourage the perusal. But a very few words, descriptive of the course of justice, in relation to murder, would also bring us back to the question between Appeals and Grand Juries, show the limits of each, and show also, that though in different forms, a previous inquest, *in favorem ritæ*, was always intended, as well between subject and subject, as between the subject and the Crown.

Thus, we find, that the absence of the *principle* of a Grand Jury, in the Law of Appeals is, under one view, no more than an abuse; and under another, to be accounted for by their radical variation from the nature and origin of trials by indictment, and that in either case, it has no bearing on the question of *ex officio* informations. As to the latter, the arguments of Sir John Hawles and Mr. Horne Tooke against them, are obviously weak. There is as much to fear from private prose-

is the most interested in the condemnation and destruction of the prosecuted—and who, if he were not liable to that objection, still, as a private person, ought not to have that power, in a country and in an age which boasts of the possession and administration of public justice*.

8°. That the female part of the community are placed in a situation of singular severity, in respect of the Appeal of Murder. No female child, nor no woman but a married woman, can bring an Appeal of Death, and no married woman for the death of any woman, nor for the death of any man but her husband; and, on the other hand, any woman may be appealed by any eligible male heir, of the death of any man; and no woman has any plea to offer, why she should not be sent to a second criminal trial, after being acquitted by “God and the country” on the first. Thus, if, in either of the Appeals now pending in our Courts, the Appellee had been a woman, the enormity of a second criminal trial would probably have been perpetrated ere this, and the unfortunate and perhaps innocent victim already

cutors, as from public. Governments are not the only false accusers, and private prosecutors are more secure from inquiry.

The early history of private rights over criminals may be seen in Robertson’s Proofs and Illustrations, appended to his View of the Progress of Society in Europe, (Hist. Charles V) Note xxiii. He is under a mistake, however, as to the release of the Earl of Salisbury.

executed, without giving rise to a moment's discussion, or a pause in which to reflect on the oppressive character of the proceeding! How different this modern situation of women, in relation to the Appeal of Murder, from that which they anciently enjoyed, has already appeared. Every woman had the right of Appeal of the death of every male and female, as largely as every man, because she was permitted to fight the Appellee by her champion. On the other hand, if appealed, she was allowed a champion for her defence. The moderns, in abolishing the use of champions, have cruelly oppressed women, as to this part of the administration of justice. Since they can no longer meet an Appellee in Battle, the law, which revolts from any Appeal without Battle, has deprived women of their Appeal, except in the very peculiar case described, while, with respect to Appeals against themselves, it has thrown them at once upon "God and the country." The *lower moderns*, the shadows of men of our own time, have found yet a deeper gulf of infamy, and left them to be hurried away, without any means of resistance whatever, to be tried a second time, after "God and the country" has acquitted them; to be condemned by a Jury that is *bullied* by the savage and ravening multitude*, and to be carried to the gallows at the

* I draw from the life; and I would use the additional epithet of *acharnée*, if it were English. None, who know the

will of a private prosecutor, in contempt of the will of the sovereign, the voice of the magistrate, and the sighs and remonstrances of the community*.

74. But, in spite of these considerations, the force and conclusiveness we may still hope to

intemperate feelings and language in which certain worthy people are indulging at the passing moment, will hesitate at discovering the likeness.

* A miserable woman may thus easily perish unjustly, under the colour and seemly garb of law; and when matters proceed in that manner, nothing is more likely to happen. If, indeed, a traitor is tried—much more if he is to suffer on the scaffold—we have honest and patriotic souls to stir up the country in his behalf—to watch every muscle of his face—to catch every syllable that he utters—to paint up his figure and gestures—to clothe the Courts, the Judges, and the public prosecutors with features of horror—to weaken our idolatry for Juries—to promote, as far as in them lies, a popular tumult for his deliverance—to convert his punishment into a martyrdom—to employ the press, while he is living—to discredit and browbeat the witnesses of his guilt—to extenuate, if not wipe away, after his death, the offence for which he suffers—and, if no other resource is left, move compassion where they have failed in victory¹. Such are the cares which we see extended to political culprits; but none of these are employed to soothe the anguish, or to rescue the innocence of vulgar prisoners, charged with ordinary offences; whose cries for justice expire within their cells, whose protestations are too necessarily taken for hardened falsehoods, and whose features, whose circumstances, and almost whose names, are alike unknown to the public.

¹ See the *Morning Chronicle*, during the trials and execution of Jeremiah Brandreth, &c. and on all similar occasions.

see (before much time shall be elapsed) universally acknowledged, advocates are not wanting, at present, to the support of the Appeal of Murder. These advocates are of two classes, the one apparently more formidable to the other. The first, and those from whom there is the least to fear, are those who, in their erroneous way, take the *judicial* view of the subject; the second, who with equal want of information and of reflection, take the *political* view only. A writer, equally ill-informed and thoughtless, comes forward, in a Dublin newspaper, with the following exquisite lucubration upon the matter in hand: "What would be the effect," he contends, "in common use, of a legislative measure, fitting the Appeal for ordinary prosecutions of homicides, may be gathered, by reflecting, that Murder is now punished *no more surely* than theft, and with *far less certainty* than forgery or coining. So, that in a sense somewhat different from that in which the complaint was first made, we may repeat the sarcasm on our laws, 'that while every thing else has become of greater value, the life of man has become of little price in the estimation of our legislature;' but the Appeal *doubles the security* of the murderer's punishment." The publication of arguments like these is infinitely desirable at the present moment. The principle of second criminal trials cannot be too broadly and distinctly brought into view. There is no danger but from

its being smuggled into public favour. Let it be discussed, and it must be abhorred. Sane legislators will talk, not of “doubling the security of the murderer’s punishment,” but of doubling the security of innocent persons, unfortunate enough to be suspected of murder. If murder is at present punished “*as surely as theft*,” what more does our wise disciple of Numa desire? Would he execute judgment for theft upon *proof*, but for murder upon *suspicion*; or, in what other way would he vary the rule of determination, as to the two crimes? If murder is punished with “far less certainty than forgery or coining,” that circumstance is occasioned by the nature of the act, and the greater liability of the offender to be taken (if the lawyers will allow me the expression) with the *mainour*; but this, though it may be a misfortune, is a misfortune without a human remedy. Let us say, *human*; for here, happily, Nature—the hand of God—comes to our aid—and makes great crimes, if they are less certainly punished, also less frequently committed. Nature revolts from murder, where it does not revolt from “forgery and coining.” After all, the newspaper-legislators, to whom I refer, have this large apology, that the nonsense which they put forth is but caught or transcribed from the most illustrious writers in our language, and from the ordinary common-place books of law writers. The necessity, then, for renewed discussion is evident;

let us see whether mankind has learned nothing, nor arrived at any greater powers nor precision of thinking, in this “enlightened age” in which we live; let us sound over the *dicta* of the age that went before us, till the experiment be fairly tried, whether or not they can be endured by the cultivation of modern ears; let us take down and dust the goodly volumes on which we have been accustomed to rely, and let us not return them to their shelves till we are sure that we have formed for ourselves, anew, a well considered estimate of their merits—a judgment which shall be conformable to that of which we so often hear—“the spirit of the times.”—If there are any crimes for which we ought to desire “a double security for punishment”—a second criminal trial—it is the crimes of treason and sedition—crimes which affect the state—the whole mass of the community; and yet these are precisely the cases in which we are most on the alert to protect the innocence of alleged offenders!—I am far from condemning this alertness,—this becoming sensibility—but let us discover it equally upon all occasions. Let us profoundly feel, that among the calamities incident to human life, false accusations are not the lightest, nor the least frequent. Of all vices, says an elegant writer, calumny is the most common; and, with respect to criminal acts, unfounded charges are not rare. Let us believe,

then, that laws must necessarily have been intended, and certainly do exist, not more to punish the guilty, than to defend the innocent; and that if men are to be protected, in their beds and on the highway, from the knife of the assassin, it is no less necessary that they should be protected, at the feet of the tribunals, from murderous prosecutors, and from the legalized blow of the executioner. Does any man doubt, that as to matters of property, it is as necessary to defend the subject against unjust suits in open Court and open day, as against evening footpads, on dark and solitary roads? And, if this can be true in matters of property, why may it not be equally true in matters of life?

75. But a second and loftier, and therefore, perhaps, more formidable class of advocates of the Appeal of Murder, has ever hitherto been found among those who have assumed to themselves the great office of guarding our political Constitution. If the sentiments of the reader, upon the law of Appeal of Murder, are in any degree in unison with those expressed in these pages, and if his acquaintance with what has heretofore been written, and heretofore passed in Parliament concerning it, is limited, it will be with nothing short of amazement that he finds it advanced, That “the Appeal of Murder is the *strongest barrier* our Constitution opposes to the prerogatives of the Crown;” (seeing that on a

conviction by Appeal, the King has no power of pardon) that Lord Chief Justice Holt has called the Appeal of Murder “a most noble birthright of an Englishman,” and that Mr. Moreton, Mr. Dunning (afterward Lord Ashburton) once spoke of it, in his place, in the House of Commons, as “that great pillar of the Constitution*.” Other persons have recommended the continuance of Appeal of Murder upon the simple grounds, that it is a part of our ancient Constitution, and from their general aversion from *reform*†.

76. Though the question of continuing or not continuing Trial by Battle appears, as is above said, to have been much agitated in Parliament between the year 1620 and 1641, I cannot find that the abolition of Appeals of Murder was ever discussed by the same authority before the year 1770. The occasion was the killing of one Allen by the soldiery, in St. George's Fields, during the disturbances at Wilkes's election. Upon this occurrence, Mr. Horne (John Horne Tooke) instigated an Appeal of Murder by the heir of the deceased person; and the mischievous tendency of the existing law being thus manifested, the Attorney-General, Mr. Stanley, moved for leave

See the Appendix.

* It is remarkable, that, as will presently be seen, on the occasion alluded to, the alarm at *reform* came from the Opposition side of the House.

to bring in a bill for taking away the Appeal of Murder. Upon debate, the motion was postponed. Of what passed in the House, on Mr. Stanley's motion, I can find no trace but in the statements made by Mr. Horne Tooke, in the course of his defence, on his trial for a libel, in 1777. "This motion," said Mr. Tooke, "was supported by Mr. Selwyn. Mr. Dyson, a Lord of the Treasury, declared himself to be entirely of their opinion: 'because the right of Appeal for Murder, was (he said) a shackle upon the King's mercy: but he begged a delay till the next winter, when he promised it should have his assistance; that so the motion might not appear in the Journals of the House all the summer, to alarm and terrify the minds of the people *before* that Bill could be passed into a law, for which at present, (he said) there was not time.' " "The Attorney-General, in his support of that motion, reviled the right of Appeal in the subject for Murder, as a Gothic custom. Gothic was the insidious charge he brought against it: it was a Gothic custom.*"

77. What was ultimately done with Mr. Stanley's motion, I have not discovered; but, in the year 1774, on occasion of the discontents in the North American Colonies, a Bill was brought

* Hargrave, xi, 273.

into the House by Mr. Wallace, entitled, a Bill for the Administration of Justice in Massachusetts Bay; and in that Bill there was a clause for taking away the Appeal of Murder in the Colonies. On this occasion, an interesting question appears to have been asked by Governor Johnson; namely, whether the abolition was to prevent the Appeal of Murder alleged to be committed within the Colonies, from being brought in England, as well as within the Colonies themselves; and the answer to this question, namely, that it was to prevent such Appeal, both in the Colonies and at home, brought on a sudden and incidental debate on the taking away of Appeal of Murder in general. The debate was supported by some of the most distinguished members of the Lower House of Parliament of that day, and the report which has come down to us preserves the opinions delivered upon that occasion. Among those who spoke, were Mr. Dunning, (afterward Lord Ashburton) Mr. Wedderburn, (afterward Lord Loughborough) Messrs. Edmund and William Burke, Mr. Stanley, Captain Phipps (afterward Lord Mulgrave,) and Mr. Fox. The debate was closed by the withdrawing of the clause; but Mr. Rose Fuller, being "the more convinced, by what he had heard that day, that the whole law relative to the Appeal for Murder ought to be repealed," gave notice, that he would on some future day, make a mo-

tion to that effect*. Mr. Horne Tooke now wrote a letter, which he signed with his initials, (J. H.) and printed in the public papers †, in defence of Appeal of Murder; and I have not learned that Mr. Fuller ever redeemed his promise to move for its abolition.

78. In 1777, Mr. Tooke was tried for publishing an alleged libel, in which the King's troops were charged with "murdering our beloved American fellow-subjects," at Lexington, in Massachusetts. The Attorney-General, at that time, was Mr. Thurlow, afterward Lord Thurlow. In the course of his defence, Mr. Tooke introduced the question of Appeals of Murder, and stated his arguments in their behalf ‡; about

* See Appendix.

† Hargrave, xi. 273.

‡ In July, 1777, John Horne (Tooke), Esq. was tried on an ex-officio information for a libel on His Majesty's Government, on the employment of troops in America. The libel consisted in an advertisement, which was published in the Public Advertiser, and other papers, in these terms:—

"King's Arms Tavern, Cornhill, June 7, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of £100, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly mur-

the same time, (1770-1777)* the cases both of

dered by the King's troops, at or near Lexington and Concord, in the province of Massachusetts, on the 19th of last April; which sum being immediately collected, it was thereupon resolved that Mr. Horne do pay to-morrow, into the hands of Messrs. Brownes and Collinson, on account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. John Horne." The advertisement was repeated at many subsequent dates.

Mr. Horne made an elaborate defence, in the course of which he said as follows:—

"Gentlemen, in this matter of charging the King's troops with murder, there is a very striking circumstance; and that too, I suppose, the Attorney-General will have forgotten. It is well known, that amongst other oppressions and enormities, which gave me pain, murders (without any contest and dispute) committed and pardoned, gave me much. I caused the soldiers in St. George's Fields to be prosecuted—the *King's troops*—for murder. I took them up. It was called no libel by the then Attorney-General; no libel against the government. They were tried for murder. I did intend to have told you how they escaped; but it matters not. They were tried; they were charged with murder; and that not only in a court of justice; I advertised it, I signed it with my name: the same printer I forgot to ask him as an evidence; indeed I had before asked him for a newspaper that contained the advertisement, but he could not send me one; he could have proved it; but it is notoriously known, I charged that murder upon the King's troops, with my name. It was not thought a libel then. It was thought a very great affront; for those troops had been thanked, in the King's name, for their alacrity upon the occasion. What then, if the King's name had been abused to thank men for their alacrity, what then? (I did not mention this, but I mentioned the murder committed.) There was

Allen and the two Kennedies occurred, (see

murder committed. I saw it with my eyes ; I saw many barbarities committed. I might have been amongst the slain. And shall I not mention what I saw with my own eyes ? Shall I have no tongue nor understanding but in a court of justice ? I certainly will. What followed : Soon after that, Mr. Stanley, a considerable officer in the State, moved in the House of Commons for an Act of Parliament to take away from the subject the right of Appeal in the case of murder ; because I had caused Appeals to be brought ; that is, I assisted the parties who brought them. This motion was supported by Mr. Selwyn. Mr. Dyson, a Lord of the Treasury, declared himself to be entirely of their opinion ;—‘ because the right of Appeal for Murder was (he said) a shackle upon the King’s mercy ; but he begged a delay till the next winter, when he promised it should have his assistance ; that so the motion might not appear in the journals of the house all the summer, to *alarm* and *terrify* the minds of the people *before* that bill could be passed into a law, for which at present, he said there was not time. To avoid its alarming the people *before* it could be passed into a law !’ Well, it did not stop there : some notice was taken of this, but not much, as it was, for that time, dropped. But this motion was revived some time after. Mr. Rose Fuller (a better man to come forwards upon such an occasion) gave notice of a renewal of that motion in the House of Commons ; he was supported by Mr. Attorney-General. I was alarmed at that, and (I will prove it ; I am not now asserting what I will not prove) I instantly published what they might have called a libel, if it had not been upon such tender ground. I sent it to the public papers, with the initials of my name : I inserted it in such a manner as could not fail to make it be known to come from me. That did not content me. I requested an honorable member of that house, who is now in Court, Mr. Alderman Oliver, to present my compliments to

page 71 *) and from that period, up to the year

Mr. Rose Fuller and the Attorney-General, and to inform them, that upon that ground, I was ready to go even to death; that I would stick at nothing; that, on such an occasion, I feared no prosecution for libel. I entreated them to tell me when they would bring the motion on, that I might be present to hear what passed, which I would faithfully report, and freely comment upon. The Attorney-General in his support of the motion, had reviled the right of Appeal in the subject for Murder, as a *Gothic* custom. *Gothic*, was the invidious charge brought against it: it was a *Gothic* custom! Why, gentlemen, so are all the rights, and liberties, and valuable laws which we have; they are all *Gothic*. But this was to be plucked out from amongst the rest: and because it is *Gothic* that men should be punished for murder, because it is a shackle upon the King's mercy, murderers are not to be punished! Gentlemen, this attempt has a near affinity with this prosecution of me, for a libel against the government, for charging the King's troops with murder. Gentlemen, I beg your attention to this matter; for you see they have got farther now in their system and their doctrines: and the mere charging of the King's troops with murder is to be considered a seditious libel against the King and the government! But what thought the

A flippant and ill read labourer in the great work of *revolution* (the author of *Historical Questions*, inserted in the *Morning Chronicle*;) has lately asked, how it happened that Count Comingsmark, who was charged with the murder of Mr. Thynne, was, at a certain subsequent period, at large, upon the Continent. The reader has seen (page 36) that the Count was at large for no better reason than this—that he had been acquitted of the charge, though he was held to bail to answer any Appeal, “if brought.”

1817, the whole proceeding, both in practice and theory, appear to have slept undisturbed.

the House of Lords, at the time of the Revolution upon this *Gothic* custom? King James the Second had cut off and murdered many of the peers, under a sham trial of a commission of peers whom he picked out. At the Revolution they took care to secure themselves from such trial in future; and therefore, on the 14th of January, 1689, they entered this among their standing orders:—‘Whereas this day was appointed for taking into consideration the report made the 8th day of this instant January, from the Lords Committees of Privileges concerning the trials of peers: after due consideration had thereof, it is resolved by the Lords spiritual and temporal in Parliament assembled, that it is the ancient right of the peers of England to be tried only in full Parliament for any capital offences. And it is ordered that this resolution be added to the roll of standing orders of this house.’ This was to secure themselves. But, when they had done this, some noble spirits amongst them, being alarmed and apprehensive, lest under this pretence, in future times, the subject might be deprived of his right to prosecute those who had committed murder, they, (three days afterwards) on the 17th of January, entered the following declaration: ‘It is declared by the Lords spiritual and temporal in Parliament assembled, that the order made the 14th day of this instant January, concerning the trials of peers in Parliament, shall not be understood or construed to extend to any *Appeal of Murder*, or other felony, to be brought against any peer or peers: and it is ordered that this declaration be entered on the roll of standing orders of this house.’ The peers, at the Revolution, (all *Gothic* as it was) took this right of the subject, and hugged it to their bosoms; and this, too, in their own case, against themselves. They would not themselves be exempt from a possibility of being prosecuted to judgment, that justice might be done for the lives of the King’s subjects,

79. In the House of Lords, though the question of abolishing the Appeal of Murder seems never to have been raised, a remarkable instance of reverential care for its preservation, as against the Peers of the Realm, (upon whom it operates with almost peculiar severity) in common with their fellow-subjects, occurred, (as has already appeared, page 67, note) at the Revolution *.

80. Though the case of Allen, and that of the Kennedies, and the motion of the Attorney-General, which has been mentioned, might be expected to have turned the attention of Members, as well as that of the public at large, to the history, operation, and merits of Appeals of Murder, yet the debate on the Massachusetts Bill is marked but by a superficial acquaintance

even if slain by themselves. However, gentlemen, this *Gothic* right of Appeal is not as yet taken from us: and I do firmly believe, that by the resolution which I shewed, and by the message which I sent, and by the libel which I published (if such things be libels, I do believe I have the merit of putting off at least for that time so infamous an attempt. Infamous four-fold, if you consider the doctrine now brought forwards. The King's troops shall not even be charged with murder! Observe then what follows; the King perhaps will not pursue; the subject shall lose his right of Appeal; and you shall not even dare to say, that the King's troops have committed murder." *Hargrave's State Trials*, xi, 273.

* See the statement repeated, with the reasons and circumstances, in Mr. Tooke's speech, in the preceding note.

with, and often erroneous understanding, of those subjects. Mr. Burke's proposition, that our municipal law is a whole, the parts of which ought not to be separated, is equally extraordinary and untenable. If it can be maintained, our laws are like those of the Medes and Persians, and cannot advance with the progress of society. When the same gentleman likened the Appeal of Murder to the Appeals of Rape and Robbery, he overlooked the important consideration, that it is only the Appeal of Murder (or rather the Appeal of Death) which can be made use of to procure a *second* criminal trial. As the law stands, if a man robs my hen-roost, I may demand a Duel with him, instead of causing him to be indicted for the offence. The two courses are equally open to me. I may indict him, if I have *evidence to produce to a Jury*, and I may fight him, if I have *none*. But I cannot do *both*. With respect to Murder, however, I may. I may cause a man or woman to be indicted—I may employ counsel against the prisoner—I may produce evidence; and if he or she is acquitted, I may afterward appeal him or her, &c. Mr. Burke allowed that Combat *was* part of the Appeal, and characterized it according to the usual common-places. He did not know, (what, in these pages, we have been so repeatedly called upon to confess) that the thing sought for by Appeal is Battle; and that the barbarism of Battle is the barbarism of

Appeal. Mr. Fox, at the same time, was in error, when he described the Appeal of a Murder, as “the only instance in our laws, in which satisfaction is allowed to the injured by the blood of another;” since the same satisfaction is allowed in regard of all capital offences.

81. Mr. Skynner (as far as appears from the report *) entered most particularly into the provisions of the Law of Appeals, and in so doing fell into several mistakes. “The Appeal for Murder,” he said, “is considered as a civil action, and to go on, hand in hand, with the criminal prosecution.” Sir George Savile, very justly, as well as smartly, replied, that he could not understand “that to be a civil action which ends in *hanging*.” Mr. Skynner evidently confounds his theory of Appeals of Murder with the civil actions for assault and defamation, “which may go on, hand in hand, with the criminal prosecution;” but which have for their “ends,” the one, criminal punishment, and the other, civil damages. What the same gentleman could afterward mean, (supposing him to have used them) by the words, “the Appeal of Murder

* See the Appendix. The report is very imperfect, and in some places almost unintelligible; one reason for which, perhaps, is, that the standing order for the exclusion of strangers was strictly enforced during the debate.

may be reduced to a civil action," is worth inquiry, if there is the slightest foundation for the remark.

82. On the opposite side of the argument, we find, in the same report, some of the finest maxims of jurisprudence laid down, which can proceed from the lips of man; those maxims which hallow human law, and almost raise it above humanity*. "I apprehend," said the Attorney General, "that criminal laws were made to save the lives of persons, and not to destroy them†." "A Trial," said the same enlightened lawyer, (that is, a judicial process,) "is not complete without the power of pardon" in the Judge. Mr. Fox magnificently said, "I look upon the power of pardon a right in the subject to claim."

83. Mr. Fox, and others, whose opinions were adverse to the Appeal of Murder, still declared themselves against its abolition in the American

* "Of law, no less can be acknowledged, than that her seat is the bosom of God; her voice the harmony of the world; all things in heaven and earth do her homage; the very least, as feeling her care, and the greatest, as not exempt from her power." HOOKER.

† That is, society interposes in the quarrels of its members, to prevent the innocent from suffering under the arbitrary will and unfounded rage of private persons.

Colonies; but this course was taken, ostensibly and constitutionally, because they would not consent to have one law in the Colonies, and another law at home; and secretly and politically, perhaps, because its abolition, at that juncture, in the Colonies, would have been a furtherance of the ministerial measures of the time. They condemned the law in a general view, but they would not consent to its partial alteration, for a particular purpose. This brief analysis of the spirit of the debate of 1774, may be useful, to prevent the example of the rejection of the proposed partial abolition of the Appeal of Murder, at that time, and under the circumstances of that time, from being drawn into a precedent, to guide any member of Parliament under other circumstances, and at the present day.

84. The other arguments adduced against the clause, though immaterial to the merits of the Appeal of Murder in itself, are sufficiently interesting to all those Colonial possessions which form so important a part of the British empire, to justify a short digression in their regard. Mr. Dunning doubted whether the Appeal of Murder existed in America; and Mr. Moreton was convinced that it was not. Mr. Fox, on the other hand, believed it to be law in the Colonies, and would not consent to the clause, because

“ he thought the Americans had a right to the same laws as we.” Captain Phipps “ wished to give every man in America the same kind of right that we enjoy ourselves. The Americans had carried with them all the privileges, laws, and liberties of the country : if they had a right to part of those laws, they had a right to the whole.” Mr. Skynner did not dispute the existence of the law in America, but imagined that it could not be brought into operation there, from the want of a Court of Chancery. The writ, he said, must first issue out of the Court of Chancery ; but, as there was no such Court in America, it could not take its rise in that country. Again, “ a writ,” according to the notion of that gentleman, “ can only issue when the person is in the actual custody of the marshal.” Upon all these points, Mr. Skynner, as we shall presently see, was under a mistake. That British Colonists carry with them, to their respective Colonies, “ all the privileges, laws, and liberties of the country ; and that as they have part of the laws, so they have the whole ;” there is no one, it is to be believed, who, at this day, will be disposed to controvert. At this day, then, in every British Dependent Colony, the Appeal of Murder exists in as full force as within the realm itself. Nay, it subsists also, at this day, in the same force, in the British Independent Colonies of the United States of America, as it

does in England, and as it did in those Colonies, in the year 1774. The Courts of the United States admit, as the law of the land, whatever was the law of England previously to the separation of the Colonies, and has not since been specially abrogated by their own domestic laws. In reality, the Appeal of Murder belongs to the whole ancient law of Europe, and is therefore, probably, law in every European Colony*. With respect to the assertion, that "the writ can only issue when the person is in the custody of the marshal," that is entirely untrue; as is equally so the representation, that the Appeal cannot be brought but by writ issuing out of Chancery. Whether or not Mr. Skynner was accurate in his assertion, in the year 1774, that there was no Court of Chancery in America, I am not prepared to say; but there are Courts of Chancery, at this day, in most, if not in all the British Colonies, and in some of the states composing the United States of America. But further, Appeals (as the ordinary law books will show) may be brought before any of the King's Justices of Assise, Sheriffs, &c. Thus, the Appeal of Murder exists in every British Colony, dependent and independent, and with or without a Court of Chancery; and this either because British

* *Ex gratiâ*, it is the ancient law of France, and is therefore, probably, the law of Lower Canada, the basis of whose code consists in the law or customs of Paris.

Colonists invariably carry with them "all the laws, privileges, and liberties of the country;" or, because, in British Colonies governed by foreign laws, those foreign laws equally bestow the Appeal of Murder.

85. One thing, however, in the debate referred to, is equally conspicuous and satisfactory. Of all the honourable speakers, no one dreamed of defending the Appeal of Murder as a help to public justice; and we may safely consider the objections to its abolition as confined to two only; namely,

1°. An objection to all reform or innovation; and,

2°. An objection to the removal of this particular exception to the prerogative of mercy in the Crown.

86. As to the objection first in order, whatever, in the year 1774, might be the Whig horror of *reform* or innovation, we have nothing to apprehend from that feeling at present. To be serious, however, we must observe, **FIRST**, that every reform stands upon its own merits; reform never being bad, simply because it is reform, but only because it is bad reform. **SECONDLY**, the position, that the discontinuance

of the Appeal of Murder would be an innovation on the Constitution, is absolutely false. The Appeal is merely a part of our municipal law, a part of our criminal code, and any alteration concerning it would no more be an innovation on the Constitution, than were the acts which made forgery and frame-breaking capital offences, or which made it penal to possess a given quantity of paper of given manufacture, or than would be the acts that should alter the law in any of those respects. **THIRDLY**, the Appeal of Murder, as now subsisting, is no part of our ancient Constitution nor code of law; it is altogether a modern contrivance; a mere "thing of shreds and patches;" the most violent innovations have already been made in it; the statute of Henry VII is itself a grievous innovation. It is open to every further innovation which we may judge to be for the benefit of our criminal system of jurisprudence.

37. The only argument, in behalf of the Appeal of Murder, for which a serious answer is proper, is that, which, without reference to the antiquity and pretended connection of the Appeal with the Constitution, pretends to assert, that an exception, in the case of murder, to the prerogative of mercy in the Crown, ought, upon principle, to be a part of our system of government. A man may maintain an opinion to that

effect, without violation of logic or of history, and therefore such an opinion deserves a serious reply.

88. It is not necessary to dwell, in this place, on the consideration, that, if the opinion is correct, the existing Law of Appeals must seem to be in a state very inadequate to the great purpose it is to answer. As it originally stood, when it was scarcely possible that any murder should take place, but some one had a right to appeal the murderer or murderers, it was a law, equal, general, and powerful in its operation; but, in its present contracted and capricious state, it must be partial, and therefore unjust; for the most part inoperative, and therefore feeble. If it is really useful, "*reform* it altogether;" restore to it its universality; let every subject have the Appeal: we know how to render it generally available; we know the grandeur of our Habeas Corpus Act; we know the fulness of the powers of the Court of the Chancery; let us emulate these, and let every *next friend* have the right of Appeal, that so the private right may never be merged in the public one, and private law and private motives may always have the preference of public government and public justice! If matters are not thus; if it is not really useful; if it can serve no purpose that is really beneficial to the state; if its present partial influence is, on account of its very partiality, oppressive, let us

away with it; let us complete the good work in which our fathers were engaged, that of cutting it, root and branch, from around the goodly tree of our Constitution, to which, itself a filthy and noxious weed, it clings!

89. But let us go to the abstract principle. Let us suppose that we were at this moment erecting a new Constitution, and enacting a new and complete body of laws. Is it possible, that in this case, we should think of introducing such a principle as that contended for by the friends of the Appeal of Murder? We live in an era that has been fruitful in new Constitutions and codes; and let us make it our business to inquire, whether any of the Solons of the age have thought of introducing such a principle into their fabrics*? “It will not be suspected,” says a Dublin newspaper, quoted already, “that we entertain any disrespectful feeling to the monarchy, in expressing our hope, that the Appeal of Murder may be relieved from the unchristian incumbrance of Battle, and *restored* to its proper condition, as a sure preventive of wanton homicide, and an wholesome check to the prerogative. At present, by the law of England and Ireland, the sovereign has no power to par-

* Ask, for example, whether such a principle is to be found in the Code Napoleon, or the constitution of the states composing the United States of America?

don the invasion of a subject's liberty; yet, if a wicked minister were to employ or connive at the knife of an athletic ruffian, the child of the victim must seek the murderer's punishment at the peril of his life." In replying to these observations. I am not called upon to dispute that the powers of government may be abused; I am not called upon to deny, that there may be wicked ministers; but I cannot be wrong, when I maintain, that all breaches of the peace are properly cognizable by the public only; that civil society implies the surrender of the private right, in this respect, into the public hands; that the rights in the public hands must be deposited in those of the government; that the government must be placed somewhere; and, lastly, that if there may be abuses, on the part of persons exercising the powers of government, the chance is, at least, equal, that there would be abuses on the part of private individuals; and this the rather, because we may emphatically say, that the first act under an obvious, a defined, and a heavy responsibility, and open, at least, to general observation and censure, while the second act under no responsibility at all, are protected from censure, and are too obscure for observation. If I am to proceed further with this reply, I must go into a general defence of civil government, and, in a regular treatise, show, why the civil is better than the

savage state, and guided by what maxims, all founders of states, and all makers of laws, have pursued their respective tasks! The constitutional controul of the Crown, that is, of the government of England, is in the collective authority of Parliament, and not in individual subjects.

90. The exercise of the prerogative of pardon is one of the duties imposed upon the sovereign by his coronation oath; nevertheless, the abuses of that exercise have been a subject of much difficulty in the early periods of our history, and there exists, perhaps, a traditional feeling of jealousy in its regard; a feeling which does not properly belong to the times in which we live; that is, the times posterior to the Revolution, and under the existing parliamentary controul of the Ministers of the Crown*. “Appeals,” says Mr. Barrington, “are so much disused at present, that we may be apt to conceive no regulation with regard to them can be of any great constitutional importance; *there were reasons, however, to prosecute offences in this manner, rather than by indictment, which do not hold at present.* One of the methods, by which not only the kings of England, but of other parts of Europe, raised

* For the ancient history of royal pardons in England, and for the statutory restraints on this branch of the prerogative, see Blackstone’s Commentaries, and Reeves’s History of the Law of England.

money, at this time, was, by pardoning crimes for considerable sums of money ; which appears by the many old laws restraining this most excellent and humane prerogative, as it is now exercised. The ancient punishment for murder was a weregild, paid as a satisfaction to the nearest relation ; and it was therefore a most crying abuse of power in the king, not only to pardon this most heinous crime, but in consideration also of the mulct, which otherwise should have been given to the relation who prosecuted. It is in this sense, I should apprehend, that Lord Chief Justice Holt hath somewhere called an Appeal, ‘a most noble birthright of an Englishman,’ because it is a right which the Crown cannot deprive him of.”—Mr. Barrington’s observation, that the reasons, founded on the ancient state of things, do not hold at present, is entirely just. The condition of the Crown has been materially altered by the Revolution ; its ministers are responsible for its acts ; and their abuse of its prerogative of pardon is as tangible as any other ministerial offence. I am far from denying that the prerogative of pardon, like every other prerogative of the Crown, may be abused ; but do we not hold, in reference to this prerogative, a pledge as good as that which we hold for any other ? and can a reason be assigned, why we should be more jealous of this prerogative than of the rest ? Do our fears of

the abuses of government go the length of inducing us to renounce the uses of government? Are we willing to resemble, in our political fears, the over-caution of him that should starve himself to death, lest he should be poisoned by his food?

91. But the argument of our opponents is purely theoretical, and of no practical weight whatever. It supposes the existence of that which in reality does not exist; and the necessity of guarding that, which, in reality, is not left us to keep. The extreme casualty of the circumstances under which Appeals can be brought, and consequently the rarity and uncertainty with which they can be opposed to the prerogative of pardon in the Crown, (and which has been strikingly seen in the course of these pages) turns the question into absolute ridicule, and gives us all the advantages of the argument *ex absurdo*. If the Appeal of Murder is of any real value, either to the administration of justice, to the just claims of the individuals, or to the due balance of the Constitution, it can be so only in as far as it is universal; and every subject, in that case, ought to have an Appeal of the death of every other subject, and much more, every relative of every relative, or, at least, every child of the death of the parent, every heir of the death of his ancestor, &c. Such a provision of law, however

radically vicious it might be proved, might at least be defended with a show of reason.

92. But the existing law is not simply insufficient for the purpose for which it is professed to be preserved. It has a much graver inconvenience; it is in the highest degree mischievous. Its casual operation, and difficult application, not only render it unavailing for the regular and noiseless operation of justice, and for the regular and noiseless preservation of the public liberties, (objects which alone deserve the regard of the genuine, the rational, and the honest citizen and patriot) but render it also a tool of passion between subject and subject, and a weapon of sedition against the state, in the hands of selfish, ambitious, and designing men, who, from time to time, attempt to acquire a character for exclusive patriotism with the multitude. "Appeals," says Lord Coke, "are less frequent than Indictment, because the first is more chargeable than the last; for, though we hear not of late of any Appeals but in Murder, yet they lie in Robbery, Burglary, Felony, and in all crimes at Common Law punishable by loss of life or member." Thus, we see, (and have before seen) that not only the peculiarity of the cases in which Appeals of Murder can be brought, but the personal difficulties, and the expenses, attending them, stand in the way of their use; and that hence is

to be expected, what in practice is known to be true, that they are never brought but in cases of peculiar irritation, or in worse circumstances. In cases unconnected with political effervescence, it is not necessary that we should go so far as to say, with Mr. Stanley, that they are never brought but with the view of obtaining money: it is an evil equally to be avoided, if they are brought, with motives however disinterested, under circumstances of private or public intemperance or delusion. It would seem, that most of the Appeals of Murder, of late years, have been brought by persons in indigent conditions of life, and at the *instigation* of those, who, from whatever excusable motive, have practised on the minds of such persons. Now, this, in itself, is a most impure and suspicious source of public justice. We know, on the one side, the pleasure of being patrons, and how often it diverts the indolence of such as are able to bestow, to be the prime movers of a bustle, and to acquire some distinction in a neighbourhood; appetites which, however they may be turned to the best purposes, and made to contribute to the truest welfare of society, are also to be narrowly watched, because they may be equally employed to the most mischievous ends. We may take it as a general rule, that there is an ordinary and very widely spread description of persons, who had much rather see a house on fire, than in the tedious state of perpetual quiet and endurance. But,

further, we must also remember the temptations of the indigent and obscure, when, on account of any such occurrence, they find themselves taken notice of—find others thronging about them—find themselves of a momentary consequence—derive, perhaps, a momentary gain, and flatter themselves with a permanent improvement of their prospects. What temptations, I repeat, for stepping a little out of the course which would have been pursued in circumstances dissimilar! But all these inconveniences are aggravated, if the affair has any political colour, by so much the more as the bustle of a kingdom is greater, and more worth the raising, than that of a parish or a county. The Appeal, in the case of the Kennedies, was the result of a factious *instigation*, and moved by factious subscription; and the Appeal, in that of Allen, was instigated by Mr. Horne Tooke.

93. In point of fact, one of the main objects of modern and pseudo-patriots, in the maintenance of the Appeal of Murder, is the hope of occasionally entrapping some individual of the King's land or sea service, who, in the exercise of his duty, shall unfortunately be the cause of the death of a subject. On such an event, a just jealousy naturally prevails; popular irritation is easily excited; and the very occasion, when the coolest administration of justice should obtain, and the whole nation is most called upon to preside, by its government, over the inquiry and sentence in

the case,—is seized upon by individuals, who, falsely assuming to themselves to represent the country, indulge their own vanity, their own ambition, their own passions, or their own motives, of whatever kind and whatever purity; who render the heir or the widow, if such can be found, the nominal prosecutor indeed, but, in reality, the tool of a faction.—I ask, again and again, whether this is to be tolerated, under any notion of government that can be named *?

94. It is now more than forty years, since the question of abolishing the Appeal of Murder was last agitated in Parliament. Within that period,

* Fit occasions for the mischievous use of Appeals of Murder and Wounds, appeared to have occurred lately at Brighton and Deal. The popular irritation in those two places is notorious, and just such as may find vents in Appeals. Parliament will surely do well to abolish their use before the ensuing Lent Assizes. Indeed, without reference to those particular cases, we may be sure, that if the Appeal at present before the Court of King's Bench succeeds, we shall immediately hear of more. There is a mania of imitation which constantly afflicts the public mind. Beside, the present agitation of the question, if it does not lead to a decision of the public opinion against the propriety of Appeals, will inevitably fix it in their behalf. May I inquire, in this place, whether it is true, as reported, that the unfortunate transaction at Brighton originated in the morose and puritanical disposition too generally prevalent,—to rob the people of their sports, and turn them, at once, to sedition in politics, and to fanaticism in religion—and consequently make them discontented both with church and state?

important changes have taken place in the political state of society. It is less that the strength of thrones has been shaken,* as that the natural aristocracy of every country has lost ground. It is the upper classes of society, the natural mediators and bulwarks between the government and the multitude, that has sunk. The superior classes, and with them, constitutional information, have lost ground. The crowd, half-taught, and half-thinking, has rushed in; the people, the multitude, have acquired, and are acquiring, an undue weight in the English Constitution. Those, therefore, who love the enjoyment, and understand the basis and the springs, of civil liberty, are alarmed for its loss, from the danger which threatens us, of a necessary submission to power, in order to escape from anarchy. The Constitution is endangered by the inroads of the people*; inroads which are foreign to its frame, and which, beyond a certain point, it will not be able to bear†. At such a

* And from the desertion of its natural defenders—the Opposition in Parliament.

† We are never to forget, that the Constitution, or at least the liberties we enjoy under it, are, as they always have been, the creatures of times and circumstances. Every successive generation has the usufruct of the Constitution, and enjoys it as it can, or as it pleases. The great alterations in the state of society in England has been the constant source of alterations equally great in the system of our laws and government, and we may depend on it that the same cause will continue

time, defects in the fabric of our polity—and the Appeal of Murder is a defect—ought to be narrowly scrutinized, and sedulously cured. The true patriot looks for the preservation of liberty from institutions regular and uniform in their operation; and not from accidents, from occasions of public heat, in which it unavoidably happens, that more is lost than gained. Civil liberty, (it may be proved to demonstration) is a plant that flourishes only in a kindly soil, and under an equal sky. In ungrateful earth it perishes, and amid storms it is swept away. Public quiet promotes its expansion; amid tumults it is necessarily contracted and abridged*.

to produce the same effect. It is true, that we always stand on the same plank; but the plank is drifting with the stream, and we shall lose all knowledge of our true situation, unless we perpetually watch the varied shiftings of the objects on shore.

There wants nothing, at this moment, to seal our ruin, but a reform in Parliament. Let annual Parliaments, or universal suffrage, or even more limited, but yet sweeping reforms, be adopted, and our Constitution is gone. Yet to these points the state of society in England is pressing; and we have no defence but in the education and the influence of its better-informed members. For the effects of universal suffrage in the United States of America, see the excellent letter of the Earl of Selkirk to Major Cartwright. The effects, however, may be seen nearer home. We have a few seats in Parliament, which are filled nearly upon this principle of election, and, from the consequences, they ought to serve us as beacons.

* We see, daily, the evidence of the foul and imbecile league which the Opposition in Parliament condescends to cultivate

95. Mr. Fox justly esteemed the power of pardon in the Crown to be the right of the sub-

with the lowest dregs of Jacobinism. It is not enough that we witness in the publications which it countenances, an identity of language with those other publications, in which, under the mask, or almost without the mask, of zeal for Constitutional freedom, the overthrow of the Constitution is the direct purpose. We have the perpetual mortification to hear the most brainless, the most heartless, and the most malignant of the phrases and sentiments of the meanest demagogues, echoed in either house of Parliament. At other times, it is the Opposition who take the van. *Legitimacy* is now the watch-word of revolution, and it first began to flourish in the House of Commons, at the commencement of the late session of Parliament. There, too, began all the inflammatory movements, which afterwards, by regular descent, proceeded to Palace Yard, Spa Fields, and Nottingham.

This degradation of character in the Opposition in Parliament, is to none more afflicting, than to those who may be stigmatized as the advocates of slavery and satellites of power. Opposition loses its influence, and therefore loses its station. It is no longer a bulwark against the ministers of the Crown, and, at the same time against the rabble out of doors. Honest men are left between two fires, and are forced to abide by those whom they may dread, for the sake of protection against those from whom the danger is more imminent and more terrible.

And what does Opposition gain by the unholy alliance? It loses the support of the decent and well-informed, and it will never be able to satisfy and identify itself with the revolutionists. The latter, doubtlessly, is not its purpose, and the former it must attempt in vain. It may offer to go to Hounslow, but that is nothing, if it will not go to Windsor.

Opposition, so conducted, is destitute of the imposing grandeur of learning and virtue, which might keep Ministers in

ject; for what civil right can be more precious, more indispensable, more consistent with the theory of the social compact, than the right of being protected by the community, whose representative the Crown is, against the violence of individuals, whether pursued with law or without it, and even against the undue severity of the law itself, which (necessarily proceeding as a machine) cannot turn aside through any moral guide or impulse: Criminal Law, then, without mercy lodged wherever is the sovereignty of the state, would plunge society into the commission of the most atrocious crimes. Criminal law, without mercy, would be like civil law without equity. "A trial," said Mr. Stanley, (that is, a

awe. It dwindles, in reality, into a Parliamentary insignificance, which leaves Ministers without controul, and is therefore, in theory, at least, of the worst consequences to the interests and liberties of the country. Opposition, so conducted, becomes impotent in its true place—in Parliament, and powerful only out of its true place—in the streets and alehouses. It becomes contemptible, where its power would be salutary, where the Constitution has placed it; and powerful, only where its power is baleful—where it is to be feared—where the Constitution has not placed it, and where it threatens, therefore, to overthrow, instead of promising to strengthen and protect, the Constitution. It becomes a meteor to deceive and to destroy, our feet, instead of a light to guide, and a fire to warm the system.

Opposition has talked much of a *new era*. Let us see a new era of Opposition. It is to commence, in the ensuing Session, under a new leader, and let it be governed by new principles. The office of Opposition is eminently honourable: it can be dishonoured only by the manner of its performance.

judicial process) “ is not complete without the power of pardon ;” for it is not enough to know that a prisoner is guilty, but we must know, also, whether he ought to pay the forfeit of his crime. *Summa jus est summa injuria.* Mr. Fox has put the case of a criminal tried and convicted, but who appears to be out of his senses. “ In this case, he is certainly not to be hanged, but the pardon is the only mode of saving his life*.” But the private prosecutor *may* pardon ; true ; but will society trust to that ? It is monstrous to suppose, that society will lend its laws and its tribunals for the gratification of private feelings ; that it will render itself the pander of private passion, the executioner of private judgments. The Appeal of Murder, in its ancient state, had none of these enormities, or at least, not without important modifications. Again, what if the prosecutor, instead of the prosecuted, “ appear to be out of his senses.” Is this so uncommon a case ? But, seriously, might not a prosecutor insist on execution to-day, and his friends sue out a statute of lunacy against him to-morrow, and adduce the execution among their proofs of its necessity ? It is said, that in society men give up a share of their *natural* rights ; but it is not so often said, that in society we acquire social or civil rights. God forbid that civilization should be a state of all loss and no gain ! it has its acquisitions, as well as its

* See the Appendix.

privations. Men may differ as to forms of government; they may differ as to whether they would live under a kingly government or not; but, in no part of the civilized world, will they differ, as to whether they would or would not live under a government which enjoys the power of pardon. How else is it a government, as to merciful objects? Where a government is without the power of pardon, men may be said to live under *law*, but not under *government*. Government is a moral, an intellectual force; it is not a mere structure of wood and iron; it is not to be moved by *steam*. Under a monarchy, vulgar men are perpetually separating the will of the sovereign from the will of the state; the will of the sovereign, lawfully exercised, and lawfully executed, is the will of the state; but let us suppose a government without a king, and the delusion which we are combating vanishes at once. If I cannot be understood in England, let me throw myself into New York or Pennsylvania, and let me ask, there, whether men would endure to live under a criminal system, in which *the state*, the *people*, had not the power of pardon? Hotspur's ladies' gentlewomen, who are so much shocked at the "vile" Battle, are indignant that the Judges, in their scarlet robes, should witness one in Tothill-fields; but what do more masculine observers think of the dignity of the state, when the Judges, even in black gowns, or no

gowns at all, are sent to tap at the doors of private prosecutors—to ride to Islington*—to know whether a convict shall or shall not be hanged? The power of pardon, vested in the sovereign, is much more than a glorious and endearing prerogative of the Crown—it is an indispensable right of the subject; and not only a judicial trial, but a constitution of government is “not complete without it;” and to take away that Appeal of Murder, therefore, is not to dilapidate the Constitution of England, nor to introduce any Macaroni† nor modern architecture, but to finish, and upon the ancient plan, that vast and solid fabric which our first ancestors began, at which successive generations have toiled, but for the completion of which, either the materials or the labour have hitherto been insufficient.

96. It remains, then, only to devise the means of this completion. While the Courts of Law, amid their present difficulties, find their best, as it is their only course, in administering the law of Appeal of Murder as nearly in conformity with the Common Law, as the Statute Law permits, to Parliament it belongs to deliver them and the country from that which is “an improper part of that code for which we are so much famed ‡.”

* See page 70.

† See the Appendix.

‡ See Appendix.

97. But Parliament, in resolving to take some step on the occasion, has the choice of two measures; and to the formation of that choice its wisdom will be directed. It will observe, that the existing law of Appeals of Murder is vicious,

1°. In its principle.

2°. In the abuse of its principle; and

3°. In the abuses of its practice.

98. The *principle* itself is vicious, because it authorizes a public prosecution for crimes, and, in the event of conviction, takes the power of pardon out of the hands of the sovereign, where it is the *right* of the subject that it should be.

99. The *abuse* of the principle consists in the application of Appeals of Murder to the purpose of procuring *second criminal trials*, the possibility of which is derived only from the unfortunate circumstances under which the statute of Henry VII was made, and from the *letter* of that statute only; and is no part of our ancient "Gothic constitution."

100. The *abuses of practice* are innumerable, and carry away the Appeal of Murder still further from our "Gothic constitution." These

consist, among others, of the partial operation of the right of Appeal, the almost total exclusion of women from that right, and above all in the modern privation of the Appellee of a Grand Jury, or previous inquiry, or *information précédente*, had before a Judge, and of the discretion to be exercised by the sovereign, whether to allow of an Appeal, (that is, to grant a Duel,) or not.

101. If Parliament shall hesitate at abolishing all Appeals, (lawful Duels) and especially the Appeals of Murder, it will not direct its authority against the *principle*, but only against the *abuse of the principle*; that is, against the practice of second criminal trials; and, in this view, all that is wanted, is, to enable an Appellee to put in a plea of *autrefois acquit* at the suit of the Crown (producing the record) in bar of the Appeal. In the event of such an enactment, the Appeal would still lie, and the private right would be saved, wherever no trial at the suit of the Crown had gone before. This would leave in its present state the private right, against any pardon granted by the Crown before trial.

102. But Parliament, in stopping here, would still leave the country exposed to many evils, and the subject to the denial of his rights and just liberties; Appeals might still be brought, before and pending a prosecution by indictment, against

persons pardoned by the Crown before trial, and against those who might otherwise be pardoned after trial; and beside, the law of Appeal would still be incumbered with all the abuses of practice, and with the question of Trial by Battle.

103. Parliament will never look so kindly on Appeals, as to separate them from Trial by Battle, which is their essential feature, which is secured to the subject by Magna Carta, and the preservation of which, as a check upon their practice, can alone comport itself with the policy of our ancestors, which has always intended their disuse.

104. Parliament, on the other hand, will see no serious difficulty in a total abolition of Appeals of Murder and all other Felonies, which were never introduced into our code upon abstract principles of right, which are mere remains of the savage state, which are protected by no charter, nor other legal impediment to abolition; and the merits of which rest solely upon principles inconsistent with civilized legislation, with the rights of man in society, with the monarchical constitution of this kingdom, and with the theory of all government, in whatever form.

105. To the British Colonies in all parts of the world, and to the United States of America, the

importance of the present inquiry presents itself with equal importance as in this kingdom. There is not one of those countries, in which Appeals of Murder and other Felonies are not lawful modes of proceeding, and where the Courts, and the lawyers, and the public, may not one day be “surprized” by Wager of Battle, as well as ourselves.

106. IN CONCLUSION, I submit, that I have now satisfactorily shown,

1°. To our Courts of Law, that contrary to their past interpretations, the Appeal of Murder is a proceeding to which, instead of giving aid and encouragement, they should oppose every practicable and lawful impediment.

2°. To Parliament, that contrary to the tone of former feelings, the Appeal of Murder is not a proceeding, which, with reference to the national liberties, the continuance ought to be jealously guarded; that, in point of theory, it is not a “great pillar of the Constitution,” and that in point of fact, it has not, in its present shape, any pretension to be ranked among those “Gothic” institutions to which we owe our political blessings, and which, therefore, we are to touch with caution. That in reality, it was at the first, but a wild crab-tree in the garden of the state;

that our ancient gardeners despised it, and lopped away its branches; that one good man devised the making a graft upon the stock, which though it put an end to the production of the natural sour fruit, yet introduced bitter and even poisonous fruit in its place; that in short, the whole is a decayed, unsightly, and dangerous plant; and that it has experienced the fortunes, so it should share the final disposal, of the old and baleful yew-tree, into which the rude but honest Baucis and Philemon were changed:

Here Baucis, there Philemon, grew;
Till once a parson of our town,
To mend his barn, cut Baucis down;
At which 'tis hard to be believ'd
How much the other tree was griev'd,
Grew scrubby, died a-top, was stunted:
So the next parson stubb'd and burnt it.*

3°. To the Country at large, I have shown, that, contrary to the popular estimate, the Appeal of Murder is a stain upon the administration of justice: that its existence is condemned by our Common Law; that it takes from the subject the protection both of Magistrates and of Grand Juries; that it even arrests and imprisons him whom a Petit Jury has acquitted; that it violates TRIAL BY JURY; that it holds out a precedent for disturbing all criminal verdicts; that it is an

* Swift's Baucis and Philemon.

“impious” rejection of the “Judgment of God;” that (in theory, if not in practice) it constitutes an act as much distinguished by absurdity as impiety; namely, the sending a man to be “tried by God,” a second time: that it is partial in its operation, and therefore unjust and oppressive; that it is an instrument of oppression and persecution, *equally within the reach of Crown and of subject, and therefore equally liable to be made use of by either*; that its existence in our Statute-books is an accident, to be ascribed to unfortunate circumstances, and not to the choice of our ancestors; and that the principle which it assumes—that of taking the administration of justice out of the hands of the government of the country, and especially that of foreclosing the public mercy, and placing the discretion, the power of death, and the right to bind or to release, to buy or to sell the life of a subject, in the private grasp, is a monster in political science, a contempt for morals and of the human understanding, and a general reproach upon the nation; and excusable from the recollection of that state of society for which we have gradually emerged, and of which it is not extraordinary that we should retain some vestiges. Nay, even this excuse does not reach all the darkness of the case; but we must take into account also, the difficulty of succeeding perfectly in the production of new forms, when we work with old and mis-shapen materials.

107. To Government it must be unnecessary to say a single word. The Ministers of the Crown, in all times, can have taken but a single view of the Appeal of Murder. They can have regarded it only as a portion of the wild common of nature, never yet reclaimed, nor applied to the uses of civilized man; as a remnant of that state of society in which public government either was none, or was very limited in powers. They must have regarded it as what has hitherto resisted the progress of social institutions, and the establishment of civil authority. They must have regarded it as dangerous to the rights of the liberties and life of the subject, which they were bound to protect, and dangerous to the interests of the state, which they were still more called upon to maintain. They must have considered it, not only as a departure from the equitable course of justice, but as a weapon to be peculiarly seized upon, in moments either of individual or popular irritation, and perhaps delusion, for the exercise of cruelty against particular persons, either high or low, either in public or private stations, or for the indulgence of faction, or for the nourishment of sedition, and for the production of murmurs, tumult and disorder. Ministers of our own day must lament the prolonged existence of this relic of our ancient barbarism, and limited influence of civil government; and must view with peculiar content a reluctance to its perpetua-

tion, at a time, when the progress of popular power and principles of insubordination, threaten us with barbarism again, and ought to create a jealous watchfulness of all the powers which are still left in the hands of individuals. I say, *individuals*, and not *the people* ; because the interests of the people and of the state are the same, or rather they are but one ; but the interests, the passions, of individuals may often be in hostility to the people—*the people*, whose representative, support and strength is the Crown. Robertson, after tracing the growth of the royal prerogatives in Europe, and the gradual suppression of almost all interference with the public administration of justice, concludes his survey by observing, “Thus Kings became once more the heads of the community, and the dispensers of justice to their subjects.”

103. But if I am wrong in supposing these reasonings to be conclusive ; and if, at last, we are still of opinion, that the Appeal of Murder ought to continue to make part of our law, and to continue in its present state, we must give our assent to the following propositions :

1°. That though it is right, that in general, no man should be put into jeopardy of his life more than once upon one criminal charge, yet it is also right that *some men* should be made exceptions to this rule.

2°. That those exceptions ought not to depend upon any regular principle, having reference to the heinousness of particular acts of guilt, nor to any other rational ground of distinction, but ought to be the mere result of accidental circumstances.

3°. That it is a sensible and creditable rule of law, that if a murdered person happens to leave a wife, or an heir male of a particular description, then his murderer shall be tried twice ; but if such person does not leave a wife, nor any heir but an heir female, then his murderer shall be tried no more than once.

4°. That the Trial by Jury is a defective institution, and that a verdict of acquittal of a Petit Jury ought not to deliver a suspected person from pursuit.

5°. That the institution of Grand Juries is an useless and cumbersome piece of antiquity ; and that the interference of those bodies, between the prosecutor and the prosecuted, is an act of idle impertinence, and wholly unimportant to the liberty of the subject.

6°. That a preliminary examination by a Magistrate, of a person charged with any offence, is, in like manner, idle, impertinent, and unimportant to the liberty of the subject ; and that

the most convenient method of putting a man upon his deliverance, is, to cause him to be apprehended, imprisoned, and forced to incur jeopardy of his life, upon the mere affidavit of his accuser.

7°. That though there are strong and reasonable grounds of alarm, at an information *ex officio*, and consequent exclusion of the voice of a Grand Jury, by an Attorney-General of the Crown, a great public officer, whose transactions are under the eye of Parliament and the nation, and who may be called to account for any misuse of his authority; yet there is no ground for alarm, no probability of oppression nor error, when an information *of right*, equally excluding the intervention of a Grand Jury, is sworn by a private subject, whose situation is obscure, whose conduct is not watched by the nation, whose motives may be evil, or may be erroneous; and whose error, at least, can be visited with no public chastisement.

8°. That though it is a popular English notion, that every man ought to be tried by his equals, yet it is right that the Peers of the Realm should be deprived of that privilege.

9°. That it is right, that when a culprit is tried by two successive Juries, and is acquitted by a

first Jury, and found guilty by a second, the verdict of guilty should have the preference of the verdict of acquittal, and that the culprit should be put to death accordingly.

10°. That it is right, that private persons should have the power to send their fellow-subjects to execution, to release them at their pleasure, and to receive money as the price of their favour.

11°. That the prerogative of mercy is an odious attribute of the British Crown, and even an infringement on the liberties of the subject; and that criminal law ought to stand upon such a foundation, that when sentence of death has been pronounced, no authority in the state shall have the power to interpose, under any circumstances whatever, for his deliverance.

12°. That a law, through the operation of which, one guilty person shall be accidentally placed out of the reach of the royal pardon, while another person, equally guilty, shall experience no equal severity, is "a great pillar of the Constitution."

13°. That neither the inquests of Coroners' Juries, nor the presentments of Grand Juries,

nor the controul of Parliament, are constitutional substitutes for the Appeal of Murder.

109. And further, if the Appeal of Murder must be continued, and, at the same time, we are willing to reconcile its provisions with common sense—

1°. Let us declare, that in *all* cases of suspicion of murder, the suspected person shall be liable to be tried twice, first at the suit of the King, and secondly at the suit of *any relative, or next friend*.

2°. Let the royal mercy reach judgments on Appeal, as well as judgments on indictment.

3°. On these terms, let us abolish the Trial by Battle; but, at the same time, let us abolish the use of the name of “God,” in the Trial by Jury; since it must be “impious” to bring into doubt the “Judgment of God,” and to demand a second hearing of the Almighty.

110. But if all or either of these points are inadmissible, then we must abolish Appeals, and especially Appeals of Murder; and, in that manner, deliver ourselves from TRIAL BY BATTLE.

APPENDIX.

No. I.

IN THE KING'S BENCH.

Rex versus John Taylor,

AND

Elizabeth Smith, Widow, versus eundem.

THIS matter first came before the Court on the first day of Hilary Term, 1771. The Jurors had delivered a special verdict, and prayed the advice of the Court, whether Taylor was guilty of murder, or man-slaughter only. The case was argued on the 8th of February, before Lord Mansfield, who decided, that it amounted to no more than man-slaughter: whereupon the prisoner, being asked by Mr. Barlow, the Secondary of the Crown Office, "What he had to say for himself, why the Court should not proceed to give judgment against him, according to law," he fell on his knees, and prayed the benefit of his clergy, which was allowed to him.

Mr. Justice Aston (as second Judge of the Court) pronounced the sentence, "That, having been convicted of man-slaughter, he should be burnt in the hand;" which sentence was immediately executed behind the Bar, but in face

of the Court, by one of the Marshal's people, who was prepared for that purpose, he was detained in custody to answer the Appeal.

SMITH, Widow, versus TAYLOR.

On Tuesday, the 12th of February, 1771, he was brought up and stood in Court, on that side of it where criminal defendants usually stand; his being brought to the Bar being dispensed with by mutual consent.

He pleaded, in bar of action, a conviction of man-slaughter, and judgement thereupon "to be burnt in the hand," and that he had been thereupon actually burnt in the hand accordingly, and then he pleaded over, to the felony and murder, "Not Guilty."

It was agreed, that this should be the *substance* of his plea; and that it should be afterwards drawn up and delivered in form, within a fortnight; but to be entered as of this day. The Court adjourned the Appeal till next Term.

The Plea, which was afterwards drawn up and delivered in form, was as follows :

The Defendant set out the whole proceedings in the indictment against him, and the special verdict, and the determination of the Court upon it, "that he was not guilty of murder, but only of feloniously killing and slaying the said James Smith;" and being immediately asked by the Court there "if he had any thing to say why the Court should not proceed to give judgement, and award execution against him thereupon," he then and there prayed the benefit of the

Statute, and it was allowed him ; and thereupon the Cour adjudged “ that he, for the felony and murder aforesaid, should be burnt in the left hand :” and he was then and there burnt in the left hand accordingly ; as by the record, &c. Wherefore he prays judgement, if the said Elizabeth Smith ought to have or maintain her said Appeal against him. He then avers his identity, and also that it was the same James Smith, and the same mortal wound. Then he prays allowance of the premises ; and pleads “ Not Guilty” as to the felony and murder.

The Appellant replies, that she ought not to be barred of her Appeal by any thing alleged in this plea, because, (protesting and not acknowledging any such record as the said John Taylor hath above pleaded in bar of the Appeal aforesaid,) for plea, she says, “ That *long before* the giving of the said supposed judgement in the said plea mentioned, she the said *Elizabeth sued out her original Writ of Appeal* against the said *John Taylor*.” And this she is ready to verify. Wherefore she prays judgement and execution against the said *John Taylor* for the premises aforesaid. Taylor demurs generally to this replication ; and the Appellant joins in demurrer.

On Tuesday, 18th June, 1771, this demurrer was argued, by Serjeant Leigh, for the Defendant ; and Mr. Davenport for the Appellant, (Serjeant Glynn, who was to have argued for her, not being well enough to come down to Westminster Hall.)

Serjeant Leigh said, it was now settled, that this is a bar ; and, as it is *in favorem vitæ*, the Court will not overturn it. He cited the following cases : Thomas Wigge’s case, 4 Co. 45 47, which shews that it is a good bar ; even though the

Appeal were antecedent to the conviction. And this case of *Wroth v. Wiggles* is cited and acknowledged in the case of *Harvey v. Reynell*. Sir Wm. Jones. 145. "A conviction upon indictments, pending the Appeal before the plea pleaded, may be pleaded in Bar."

And not only "*Autrefois convict* of man-slaughter, and clergy thereupon allowed," is a good Bar in an Appeal of Murder; but even where a person is indicted before the Coroner, of man-slaughter; and arraigned upon that indictment before Commissioners of Oyer and Terminer: and confesses the indictment, and prays his clergy; and therefore a *curia advisare vult* is entered; the whole Court held, "that the matter of a Bar had been a good Bar of the Appeal by the Common Law, as well as if the clergy had been allowed: for that the Defendant upon his confession of the indictment, had prayed his clergy, which the Court ought to have granted, and the deferring of the Court to be advised, ought not to prejudice the party Defendant, albeit the Appeal was commenced before the allowance of it." This was determined in the case of *Thomas Burgh, Esq.* brother and heir of *Henry Burgh, Esq.* (sons of *William, Lord Burgh*) upon an Appeal of Murder brought against *Thomas Holcroft, Esq.* of the death of the said *Henry Burgh, eldest brother of Thomas Burgh the Appellant*. See 3 Just. 131, c. 57. "of Appeals." See also, 4 Rep. 45. S. C. cited; 2 Leon. 83. 160. S. C. and 1 Anderson 68. S. C. and *Coke's Entries*, 53 to 56. pl. 4. S. C. where the special verdict is preserved, together with the whole record, a very curious one, and well worth reading. It is of 20 or 21 Eliz. 1578 or 1579. A guardian was assigned to the infant Appellant by the Court: An Indictment and Trial within the Verge was pleaded in Bar of the Appeal, The person killed is there called *Henry Borowe, al' Burgh*. His bro-

ther Thomas, The Appellant, though under age when he first brought the Appeal, came to full age whilst it was depending. His father was then living, upon whose death, in September, 1584, he became Lord Burgh, and was afterwards made a Knight of the Garter, and died Lord Deputy of Ireland, in October, 1597.

In the case of *Armstrong v. Lisle*, Kelyng 89 to 108, it was settled, "that the Defendant being convicted of man-slaughter, and allowed the benefit of clergy, and reading as a clerk, did bar the Appellant of his Appeal of Murder." This was resolved by the whole Court in that case: which condemns the doctrine advanced in James the Second's time, "That the Court might delay the calling the convict to judgement, to hinder him from praying his clergy; especially if any Appeal were depending before it was allowed; in order to make the defendant liable to the Appeal." One of the cases that had been so resolved was the case of *Goring and Deering*. See Kelyng, 106. In the case of *Armstrong v. Lisle*, the defendant demanded the benefit of his clergy, before the Appeal was arraigned; and when the Bill of Appeal was read, Lisle appeared to it, and prayed to be bailed; but refused to plead. He had a right to the judgement of man-slaughter, as soon as he was convicted of it. He finished his citations, with Hawkins, P. C. lib. 2, c. 36, § 13, 17, pa. 378, 379. And concluded with saying, that a man shall not be twice punished for the same offence.

Mr. *Davenport*, for the Appellant, endeavoured to show, that the present case was distinguishable from the cases cited by the Sergeant. He cited some Statutes, and a case in 1 Anderson 114. case 158. But he chiefly relied upon the case of *Goring v. Deering*, reported in 3 Mod. 156. which

was an Appeal for the murder of Henry Goring, Esq., brought by his widow. The Defendant pleaded, that he was indicted for the same murder at the Sessions House in the Old Bailey in Middlesex; that he was found guilty of man-slaughter, and not of murder, *prout patet per recordum*; that he was *clericus, et paratus fuit legere ut clericus*, if the Court would have admitted him; and that he is the same person, &c. To this plea the Appellant demurred. The fact was, that the Appeal was brought after conviction, and before sentence. Eleven judges (all except Street) assembled upon this occasion; and the Chief Justice delivered their opinion, that "this was no good plea; and that the Court ought not to ask the prisoner what he had to say, and so let him into the benefit of his clergy." He observed, that in the case now before the Court, the Defendant was not entitled to the benefit of clergy, at the time when he was arraigned upon the Appeal: whereas, in the case last cited, the Defendant had been convicted of man-slaughter before the Appeal was brought.

Sergeant Leigh, in his reply, said, it would be a most unreasonable thing, and even shocking to think of, that a man's life should be risked by the Court's taking time to advise.

Lord Mansfield and the whole Court were of opinion, that this point had been considered as settled, since the case of *Armstrong v. Lisle*. And *Mr. Justice Aston* observed, that even the case of *Goring v. Deering* does not controvert, but that *if* the Defendant *had had* his clergy, that would have been a good bar to the Appeal. He approved of *Sergeant Hawkins's* reasoning in the 14th section of the 36th chapter of his second book; and he thought that the

Court, who were said to be of counsel for the Defendant, ought to ask the Prisoner if he had any thing to say, &c.

Per Cur. unanimously.

Judgment for the Defendant, and Rule to discharge him.
Burrows, V. p. 2798—2800.

No. II.

IN THE KING'S BENCH.

Michaelmas Term, 2 and 3 Philip and Mary.

Richard Reade against Rochforth and others.

Richard Reade, brother and heir of Gerard Reade, brought an Appeal of Death against six, s. A, B, C, D, and E, as principals, and F, as accessory, and three of the principals and the accessory appeared; and the Plaintiff counted against them with a *simulcum*, the other two principals being absent, but upon no indictment, and against the accessory for procurement and abetment. Two of them and the accessory severally pleaded not guilty; whereupon the Plaintiff was at issue with them; and the third principal pleaded not guilty, and ready to defend it with his body, and waged his Battel thereof against him. And upon this plea the Plaintiff demurred in law: and several *venire faciases* were awarded to try the pleas of the others, *sed cessit processus inde*, against the accessory, until all the principals are legally, by some means, convicted of the principal fact. And in the mean time, they were severally delivered to bail. And afterwards the demurrer in law was adjudged against the Plaintiff, wherefore he was barred of his Appeal against him who waged Battel, and that he should go without day. And one of the two principals who did not appear was returned dead, and the other outlawed. And afterwards, the two principals who pleaded to issue with the Plaintiff appeared

at *nisi prius* in Northampton; and the Jury, being charged, returned to give their verdict; and the Plaintiff was nonsuited there: and upon this, at both their requests, according to the Statute, (West. 2, c. 12.) the Jury was charged *de bene esse*, to inquire of the damages sustained as well by reason of the Appeal as of the infamy and imprisonment, &c. And they assessed damages for them severally; and they were also charged *de bene esse*, whether the Plaintiff was sufficient for the damages, and if not, who were the abettors; who found that he was not sufficient, and also who were the abettors by name, s. that they procured, instigated, and abetted the said Plaintiff to take and prosecute the said Appeal in the form aforesaid, and they did not say (out of malice) Note this.

And another Jury, at the same time, was charged at *nisi prius*, against the accessory; but the record is not, that they were elected, tried, and sworn, but charged by the Court, and when they returned to give their verdict, the Plaintiff was again nonsuited: and the Jury were charged at the request of the accessory *de bene esse* to inquire of the abettors, as above, and it was done. And afterwards, at the day in banc, judgment was given, that the Plaintiff take nothing by his writ of Appeal; but for his false claim thereof be taken, and his pledges in mercy, and that the said three as to the suit of the said Plaintiff should go without day; but as to the suit of the King, &c. they were severally arraigned, and pleaded again severally not guilty. And because formerly (as appeared by the record) one of the principals was outlawed, and another dead, the accessory was brought to his trial at the suit of the King, and one of the principals also; but the other made default, whereof a *capias* was awarded against him and his maintainers, and by several Juries taken between the King and them. They

were acquitted : and it was again prayed, that the Jury might inquire of the damages and of the abettors, who were found as above. And *quare*, whether the accessory shall have process against the abettors before the acquittal of the other principal who made default, because he was not as yet lawfully acquitted ? And the Court were of opinion, that he was not lawfully acquitted as yet. And it was also well debated, whether the judges of *nisi prius* have power to inquire of the damages, where the Defendant in Appeal is acquitted ? and also, whether the Plaintiff be sufficient to pay damages ? and also of the abettors ; since the Statute (West. 2c. 12.) is, that *the Justices before whom the Appeal was commenced and terminated shall do it, &c.* And at length precedents were shown in B. R.'s. in Hil. Term. 10. H. 7. Rot. 38. and Mich. 19. H. 7. Rot. 37. that the Justices at *nisi prius* had done it, and certified the *postea in banc*. And see, 10. Ed. 4. fol. 14. b. under a nota, That they have no power at *nisi prius* to give judgment of damages by Statute, 13. H. 6. c. 1. And see the opinion of Fairfax, 22. E. 4. fol. 18.

And afterwards, in Hilary Term following, a *scire facias* was awarded against the abettors for the damages, into the County of Northumberland. And note, by the opinion of Portman, Chief Justice, the said principal, who tendered trial by Battel, and was discharged by demurrer in law, shall be arraigned at the suit of the King, because he is not yet acquitted : and for this see two precedents, s. M. 14. H. 7, Rot. 76. and Trinity in the same year, Rot. 74. The Defendants in Appeal pleaded not guilty *perpatricum*, and the Plaintiff demurred thereto, and adjudged a good plea, whereupon the Defendant was acquitted, and let to go thereof without day as to the Plaintiff ; and as to the suit of the King he was again arraigned, and pleaded the same plea ; and

this was confessed by James Hubberd, Attorney General, by special warrant of the King, which was signed by his sign manual, and entered in the pleadings verbatim, and thereupon the Defendant went without day, &c. And upon this opinion of Portman, the said principal who waged Battel, was arraigned anew at the suit of the King, and pleaded not guilty, and his plea was confessed to be true by the Attorney General, who had the warrant from the King and Queen to all this, which was entered *in hæc verba*, upon which the party had judgment of acquittal; and thereupon the accessory brought a *scire facias* against the abettors.*

EASTER TERM.

In the trial of the last principal, the damages for him were found at £10.; and that the Plaintiff was sufficient; but for the accessory, the damages were found at £220. and that the Plaintiff was not sufficient, and he had judgment against the abettors.†

* Dyer's Reports by Vaillant, Part II. 120. a. † Ibid, 131. b.

No. III.

TRIAL BY BATTLE, IN A WRIT OF RIGHT.

Ralph Claxton, Demandant, }
Richard Lilburn, Tenant, } Before Judge Barkley.

Durham Ss. August 6, 1638.

THE Demandant, the first day of the Session or Court of Pleas, the 6th day of August, did appear about ten of the clock in the forenoon, by Richard Matthew his Attorney, and brought in his champion, George Chency, in array, who cast his gantlet into the Court, with five small pence in it.

The Tenant likewise appeared by William Sedgwick his Attorney, and brought in his champion, William Peverell, in array, who cast his gantlet into Court, with five small pence in it.

After some examination of the proceedings in the cause, the parties and their champions were adjourned till three of the clock in the afternoon of the same day.

At that hour the Demandant was called, and appeared by his Attorney, with his champion. So did the Tenant and champion.

Then, after discourse had of it by the Judge, and some examination of the champions, the Judge did adjourn them, over till eight of the clock on Tuesday the 7th instant. At which time the parties and their champions appeared as before, and were adjourned till three of the clock, after dinner.

At which hour the parties and their champions appeared, and were adjourned over till Wednesday at eight of the morning.

At which day and hour the parties and their champions appeared as before, and put in their pledges (as at the Court holden the 7th of July) to appear at the next Court of Pleas to be holden the 15th of September next.

Memorandum: That the champions were committed to the custody of two Bailiffs, by direction of the Judge, and continued in their hands until eight of the clock on Wednesday the 8th of August, when they put in their pledges to appear at the next Court.

The 15th of August, 1638, I received this copy from Mr. John Stephen.

John Morland.

Concerning Claxton and Lilburn, their Trial by Battel.

His Majesty this day sitting in Council, was made acquainted, That there had been several days appointed for determining by Battel the QUESTION OF RIGHT, which had long depended between Claxton, Demandant, and Lilburn, Tenant, for certain lands in the County Palatine of Durham. And that by the late appointment, the same was to be tried

by the said parties champions the 22d December next. It was by His Majesty ordered, That the Judges of that circuit, upon conference with their brethren, should be thereby prayed and required to take the same case into due and serious consideration ; and if they could find any just way by law how the said combat might be put off, and the cause put into another way of trial ; for his Majesty, out of his pious care of his subjects, would have it so, rather than to admit of a Battel. But otherwise, since Lilburn had a judgement upon a demurrer against Claxton, and also costs from the board for his vexation, and since that Claxton had brought a new action, upon which Lilburn had waged Battel, his Majesty would not deny the Trial of Laws, if it could not be legally prevented.

- Afterwards both parties brought their champions into the Court of Durham, having *sand-bags* and *batoons*, and so tendred themselves in that fighting posture : but the Court, upon reading the record, found an error in it, committed by mistake of the Clerk (some thought wilfully done) whereupon the Court would not let them join Battel at that time.

Thus did the Court several times order to avoid Battel by deferring the matter, though champions on both sides were ever present in Court at all meetings to join Battel.

This proved an *omen* to what the next year produced by a greater appearance of a Battel, when the King's army was at the camp at Berwick, and the Scots on the other side of Tweed ; yet both armies parted also without Battel.

This Richard Lilburn, tenant in this cause, was father to John Lilburn, who was censured in the Star Chamber.

Here followeth the opinion of the Judges in this cause of Trial by a Battel, upon a Writ of Right.

The Tenant waged Battel, which was accepted; and at the day to be performed, Berkley Justice there, examined the champions of both parties, whether they were not hired for money? And they confessed they were: which confession he caused to be recorded, and gave further day to be advised. And by the King's direction all the Justices were required to deliver their opinions, whether this was cause to de-arraign the Battel by these champions? And by Bramstone, Chief Justice, Davenport, Chief Baron, Denham, Hutton, Jones, Cook, and other Justices, it was subscribed, That this exception coming after the Battel gaged, and champions allowed, and sureties given to perform it, ought not to be received." *Rushworth's Historical Collections*, Part II, 788.

Rushworth details at considerable length the proceedings in the Court of Chivalry of the case of Rea and Ramsey, the dimensions of the weapons appointed for this combat were as follows.

A Long Sword, four feet and a half in length, hilt and all; in breadth two inches.

A Short Sword, a yard and four inches in length, hilt and all; in breadth two inches.

A Pike, fifteen feet in length, head and all.

A Dagger, nineteen inches in length, hilts and all; in breadth an inch.

The weapons were not to exceed this proportion, but the parties might abate of this length and breadth if they thought fit. They were also allowed defensive weapons at their own discretion. *Rushworth*, Part II, 122.

No. IV.

HOUSE OF COMMONS, APRIL 29, 1774.

THE House went into a Committee on the Bill for the Administration of Justice in Massachusetts's Bay.

Mr. MORETON desired to know, if the Appeal for Murder did actually exist now in the Colonies?

Governor JOHNSTONE desired to know, if it was to extend to the trial of those sent to England?

Mr. WALLACE answered to them both, by saying, he meant it should extend, in both cases, as far as the Bill purported. This brought on a debate concerning the Appeal for Murder being to be taken away in general.

Mr. DUNNING. "Sir, I rise to support that great pillar of the Constitution, the Appeal for Murder; and I am not satisfied that a precedent should be instituted, in order to operate as an example for the taking it away in Great Britain as well as the Colonies. This clause considers it now as an existing law in America; I cannot say that I look upon it in that light; but this is not the first time this question has been agitated in this House, and has been called and treated as a remnant of barbarism and gothicism. The whole of our Constitution, for aught I know, is

Gothic. Is it, then, the present idea, to destroy every part of that Gothic Constitution, and adopt a Macaroni one in its stead? If so, it is a system of Ministerial despotism that is adopted here : when a political purpose is in view, things may be adopted that may tend to operate as a precedent, that may become at last prejudicial to the public welfare. I wish, Sir, that, in every step of this matter, Gentlemen would be a little more cautious, as I much fear the system would soon be adopted in England : it is a proposition produced on a sudden ; and, as, in its extent, it may turn out dangerous, I shall dissent from it.

Mr. Solicitor-General WEDDERBURN. “ I confess, Sir, that this part of our Constitution has never appeared to me as essential : it is very much of a footing with a Trial by Ordeal. Till laws and society took place, there was no other method of deciding between right and wrong. *There is now no law in being to prevent Trial by Battle* ; and not in very ancient times was it, that the Court of Common Pleas attended in Tothill-fields, to judge of the trials. None but the wife of the deceased, as a female, can appeal, and this may be compromised by a sum of money ; it may be reduced into a civil suit ; but by being adopted in the manner proposed in this clause, it can operate to no bad purpose ; nor do I conceive that the liberty of this country will be at all in danger, as it is only a temporary expedient.”

Mr. EDMUND BURKE. “ I do not contravert, in an adverse line, what is advanced by the Learned Gentleman. There is nothing more true, than that man has given up his share of the natural right of defence into that of the state, in order to be protected by it. But this is part of

the whole law, which you ought not to separate, or else you will soon lay the axe to the root of it in England. If there is an Appeal for Rape and Robbery, you ought to have one for Murder. I allow, that Combat was part of this Appeal; but it was superstition and barbarism to the last degree. I cannot, in any degree, consent that the Common Law should, in any case, be taken away from one part of His Majesty's subjects, and not from the other. But, as this is a question of great magnitude, whenever it comes on, with respect to Great Britain, I hope, then, humbly to offer my opinion on it."

MR. W. BURKE. "No man has the least doubt but the Learned Gentleman (Mr. Wallace) is fully acquainted with every part of the law, ancient as well as modern; but I think, Sir, he should have brought you in a Bill, to have repealed the law in England first; but when this great question comes on, I shall readily give my opinion on it."

MR. STANLEY entered deeply into the policy of our Constitution, and dwelt a long time on the repeal of the law respecting Appeals in general. "*I think it is hard,*" said he, "*that a man should be tried twice for the same offence, AND WHEN YOU HAVE AN ADVANTAGE, BY KNOWING HIS SECRETS AND DEFENCE. I apprehend that criminal laws were made to save the lives of persons, and not to destroy them; that the power of grace or pardon is certainly constitutional, and is a very valuable and glorious prerogative in the Crown: AND A TRIAL IS NOT COMPLETE WITHOUT IT. There never was an instance wherein the trial by Appeal was instituted, that it was not for the sake of obtaining a sum of money; and it is part of the law, that it may be*

reduced into such compensation, the whole being allowed to be a civil suit: *but taking it in its utmost sense, it is nothing but barbarism and cruelty; and I wish to abolish it, as an improper part of that code of law for which we are so much famed.*"

MR. T. TOWNSHEND. "This is a question, Sir, which has frequently been before the House, and has as often been rejected. I cannot agree to the repeal in part, unless I hear reasons given for the abolition of the whole; or at least better arguments than those I have heard, to induce me to give my opinion, to abolish that part which relates to America."

MR. CORNWALL. "The Appeal for Murder, Sir, is incorporated in the laws of England, either as a natural or a political right. Is, then, Sir, the redress of a particular injury to be remedied only by a sacrifice of the lives of others? Every body knows that manslaughter is a bar to Appeal. *But, Sir, can it be intended, as a wise political institution, that after a Trial by Jury, a single individual, to satisfy his revenge, may overturn the solemn judgment and verdict of a Jury?* It appears to me, upon examination, to be neither a political nor a natural right, and I should be sorry to give my negative to the clause."

MR. MORETON. "I think the provisions of the Bill right, but I did not apprehend that the question would have been debated in this manner: nor did I think that such an extent would have been in view, so that an example in future might have been brought of this, to attack one of the greatest pillars in this Constitution, the Appeal for Murder. If the prisoner is to be sent here, where is the use of taking

the Appeal away in America? I only wanted that you should not give a constitution of Appeal for Murder to the Colonies, when, in my own mind, I am convinced they have it not, nor is it a part of their law; and, as I think that they have no such power of Appeal, I cannot vote for this clause."

Captain PHIPPS. "I would wish to give to every man in America the same kind of right that we enjoy ourselves. Did they not carry with them all the privileges, laws and liberties of the country? If they have a right to part of those laws, they have a right to the whole. I think the Appeal for Murder ought to be sacred in this country; and whatever doctrines gentlemen may imbibe from Mr. Blackstone, I cannot conceive them to be of that authority which ought to guide and direct us. There is not a more insidious way of gaining proselytes to his opinions, than that dangerous pomp of quotations which he has practised; it conveys some of the most lurking doctrines to lead astray the minds of young men. To talk of the finger of nature pointing out law, is to me an absurdity; but I would not advise gentlemen to seek for law in the channels of these tomes. The rust of antiquity dims the sight of his readers; but if a man will open his eyes, he will find, that the finger of nature will never point out the principle of law. The great argument which I dwell upon is, that the Appeal for Murder is the law of the land: I am also for preserving mercy in the Crown; I think it the brightest jewel in it: but I think that it is a blight that will destroy all our harvest, if it is without controul. I cannot, Sir, give my consent to this part of the law being annihilated."

Mr. SKYNNER. "We are got now upon the most im-

portant question that can come on. I think the clause does not want advocates, and therefore it might be improper for me to give my opinion; but, Sir, it is no unnatural thing, that the death of a relation should be attempted to be redressed, and that the friends of the deceased should seek for justice. The Appeal for Murder, Sir, is considered as a civil action, and to go on, hand in hand, with the criminal prosecution; and surely, Sir, there is nothing, then, so exceedingly savage or barbarous in it, if it may be compensated by a *civil action*. But let us consider how this will operate in the Colonies; let us consider in what manner this action can be brought: the Americans cannot make use of it, unless their constitution allows it: a writ must first issue out of the Court of Chancery; but as they have no such court in that country, it cannot take its rise there. A writ of this kind can only issue when the person is in the actual custody of the marshal. In the process which you have laid down in the Bill before us, bail is allowed to be taken for the offence; so that he never can be actually in the custody of the marshal. Therefore, at present, as their constitution stands, I look upon the writ of an execution of Appeal to be impossible there. The Americans will think that we are breaking into their civil rights; and I think it highly improper to introduce the Appeal for Murder in this instance, as it is not necessary. But, Sir, I cannot sit down without saying a few words in defence of that able person alluded to, now a great magistrate, who has thought there is something in our Constitution worth preserving. And sorry I am to hear that great and able writer has received any reproach or admonition in this senate; and I believe the Hon. Gentleman (Captain Phipps) is singular in his opinion upon this head; and I am glad to find there are no strangers in

the gallery, for his own sake, to hear what he said*. But, Sir, I am of a different opinion from that Hon. Gentleman, and I dare say the House will agree with me, when I think that book one of the best that ever was written upon the laws of this constitution, and will do more honour to himself and this country than any that ever yet appeared; and I am sorry to hear him reproached, even by an individual, when I am sure the greatest honour will redound to this country from that able performance."

Sir RICHARD SUTTON. "Sir, I do not think that the Appeal for Murder ought to be partially taken away; if you take it away from any part of the dominions, you should take it from the whole. I am much against the measure, because I think it vindictive and cruel."

Mr. CHARLES JAMES FOX. "I AM FOR TAKING AWAY THE APPEAL FOR MURDER ENTIRELY; BUT I AM NOT FOR TAKING IT AWAY IN PART. *If the Appeal is allowed, you take away the power of pardoning in the Crown. I look upon the power of pardon as much a right in the subject to claim, as part of the trial. Suppose a criminal should be tried and convicted, and he should appear to be out of his senses? In this case he is certainly not to be hanged, the pardon being the only mode of saving his life. Appeal for Murder is the only instance in our laws, in which satisfaction is allowed to the injured by the blood of another, as it may be compensated by a sum of money. I shall vote against this clause, because I think the Americans have a right to the same laws as we have.*"

* The standing order for the exclusion of strangers was strictly enforced during the progress of the three Bills relating to the disturbances in the American Colonies.

Captain PHIPPS rose to explain himself, with regard to Mr. Blackstone, and said, however he might have represented his performance, he was glad to find it was so well defended by the warmth of friendship: that he had heard, and was sorry to hear, that book had undergone some regulations with regard to its eligibility, which he hoped was not true. He sat down rather chagrined to find his opinion with regard to that work was singular.

Sir GEORGE SAVILE. “Sir, the *appetite of revenge is, like that of hunger, never to be satisfied*. There are certain rights which we bring into society, which we give up for the good of the whole: the passion of revenge seems to under that description: and in this instance only, the blood of another may be compensated by civil action. *But I will not contend that to be a civil suit which ends in hanging*, which the Appeal of Murder does, when not compensated for. But it is necessary that men should give up certain rights which they enjoy, for the good of society at large. I would wish a fair and impartial trial to be secured, which I think is already done in the Colonies, without meddling with the Appeal for Murder.”

Mr. SKYNNER. “Sir, I only rise to explain, that the Appeal for Murder may be reduced to a civil action: that there also lies an Appeal in Robbery and Rape: and if the woman who had been injured, when the man was under the gallows to be hanged, should marry him, he would, by the ancient law, be saved, because all her civil right would be vested in her husband by that act, and therefore compensated for as such: by that act she vests those civil rights, which he had deprived her of, in him, as her husband.”

Mr. WALLACE withdrew the clause for the [abolition of the] Appeal for Murder [in the American Colonies].

Mr. R. FULLER. "Sir, I am the more convinced by what I have heard to-day, *that the whole law relative to the Appeal for Murder ought to be Repealed*. I will therefore give notice, on some future day, when I shall make the motion."

Cobbett's Parliamentary History, Vol. XVII, p. 1291.

No. V.

A DESCRIPTION OF THE PLATE.

"THE Case of Bloweberme and Le Stare is entered," says Madox, "on a small membrane, remaining in the Queen's Treasury of Records, in the Tower of London. It is written in a little hand, of the reign (as I guess upon view) of King Henry III. But the membrane (which contains several other Appeals besides this) hath suffered by time or weather, so that some parts of it are scarce legible. The figure of the Duell is drawn at the top of the membrane; and is correspondent in size and dimension to the sculpture in this page. Four small holes have been formerly made in the top of the membrane; probably, to put strings in, to file or hang it up. One of those holes passeth through the face of Walter Blowberme."

Pulton describes, as follows the arms of the Combatants. "They shall fight with weapons of small length, beeing bare headed, and haveing their hands and feet bare, with two staves of one length, horned at both endes. And either of them shall have a scutchion foure-cornered, without any yron, for that one shall not hurt the other with the yron." Pulton, p. 194. Probably, the ornaments which are seen on the shields in the plate, are stamps, or other ornaments, not of iron.

The offensive weapons here represented, agree very ill, it will be observed, with the batons and sand-bags, often mentioned in accounts of the Trial by Battle, and which (page 86) are adopted by the property-men at our theatres. But the batons and sand-bags belonged to Battle in Writs of Right, which was, in truth, as mentioned by Blackstone, a species of cudgel-playing, and where the end was in no respect the death of either champion, but only a superiority of defence. How little the whole subject was understood, on occasion of the Writ of Right in the palatinate of Durham, has appeared in a preceding article of this Appendix. That the object was entirely mistaken by the King, is plain, or *piety* would have had no share in his difficulties concerning the trial.

A Battle, in an Appeal of Robbery, is described (page 159, above), by Sir John Davies; but here, we are told, that the "Appellant's head was ever covered, but the Defendant's rayed;" that is, (rased, *rasé*) his hair cut round, or shaved off, or as is said elsewhere, "cut above the ears." All these expedients had for their object to prevent the *pulling of hair*; but the Assises de Jerusalem allows of no distinction between the heads of the Appellor and Appellee, at least in Appeals of Death. The smock-frocks represented in the plate are mentioned in the Assises:—"Les chevaliers qui se combattent pour Murtre ou pour Homicide se doivent combattre à pié, et sans *coiffé*, et estre roignés à reonde, et estre vestus de cottes vermeilles ou de chemises, ou des doubles de conde courtes, jusqu'a au genouil, et les manches coupées jusques dessus le conde, et avoir chausses vermeilles de drap à estrier sans plus, et un targue que l'on appelle *harasse*, qui soit plus grant de lui de demi pié, ou plain paume, en laquelle ait deus pertuis de commun au

grant, en tel endroit que il puisse son aversaire veir par ceaus pertuis, et doit avoir une lance et deus espées, l'une ceinte, et l'autre attachée en son escu, si que il la puisse avoir quant mestier li sera." This, it is to be remembered, was the array of *knights*, in *Appeals of Death*; "car sergens à pié se combatent de toutes quereles d'unes armeures."

The place of the target, *harasse*, *aras*, or skreen, (with two holes, through which the combatant might see his adversary,) was supplied, in the case of the Dog, (page 160, above) by "an empty cask."

The occurrence of the word "rayed" may, at this moment, be an Apology for mentioning, that the words *Rob Roy*, are, by some, interpreted, to signify "ray" or "striped cloth:" "N'affiert à clerc que est veste *robe roiée*." *Coutumes de Beauvoises*. Ch. II. "Roié, royé, radiatus."

In the plate is seen why the French call the gallows "the forks." (*les fourches*.)

The particulars of the case of Bloweberme and Le Stare, are given at page 174, (note) above.

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